TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 436

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

vs.

JAMES V. REUTER, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 18, 1943
CERTIORARI GRANTED NOVEMBER 22, 1943

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

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L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

vs.

JAMES V. REUTER, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

INDEX

1 In the District Court of the United States, Eastern District of Louisiana, New Orleans Division

No. 578 (Civil Action)

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, PLAINTIFF

vs.

JAMES V. REUTER, INC., DEFENDANT

[Appearances omitted in printing.]

2 *Bill of complaint*

Filed January 23, 1942

I

Plaintiff brings this action to enjoin defendant from violating the provisions of Sections 15 (a) (1), 15 (a) (2), 15 (a) (3), and 15 (a) (5) of the Fair Labor Standards Act of 1938 (Act of June 25, 1938, c. 676, 52 Stat. 1060; U. S. C. Title 29, Sec. 201, et seq.), hereinafter called the Act.

II

Jurisdiction of this action is conferred upon the Court by Section 17 of the Act.

III

Defendant is, and at all times hereinafter mentioned was, a corporation organized under and existing by virtue of the laws of the State of Louisiana, having its principal office, place of business and plant in the City of New Orleans, Orleans Parish, Louisiana, within the jurisdiction of this Court, and is, and

3 at all times hereinafter mentioned was, engaged at its said place of business in the said City of New Orleans in the purchasing, handling, transporting, storing, warehousing, and wholesale and distribution of fruits and vegetables in commerce among the several States.

IV

At all times hereinafter mentioned, defendant employed and is employing approximately 10 employees in and about its said place of business in New Orleans, Louisiana, in the purchasing, handling, transporting, storing, warehousing, and wholesale sale and distribution of fruits and vegetables in commerce among the several States. Substantially all of the business conducted by

defendant at its said plant, and substantially all of the operations performed by said employees are concerned with goods handled, moved, transported, or shipped in interstate commerce and are an essential part of the stream of interstate commerce and said employees are engaged in interstate commerce within the meaning of the Fair Labor Standards Act. Substantial portion of the goods purchased, handled, transported, stored, warehoused, and sold and distributed at wholesale by the said employees of the said company have been, and are being sold, transported, shipped, and delivered in interstate commerce in the State of Louisiana, to, into, and through States other than the State of Louisiana.

V

During the period beginning October 24, 1938, the effective date of Section 6 (a) (1) of the Act, and repeatedly thereafter through October 23, 1939, defendant paid to many of its aforesaid employees wages at rates less than twenty-five cents (25¢) an hour for their employment in the purchase, handling, transportation, sale and distribution of goods in interstate commerce, as aforesaid; and, during the period beginning October 24, 1939, the effective date of Section 6 (a) (2) of the Act, and repeatedly thereafter, defendant has paid to many of its aforesaid employees wages at rates less than thirty cents (30¢) an hour for their employment in the purchasing, handling, transporting, sale and distribution of goods in interstate commerce, as aforesaid. By failing and refusing to pay its said employees wages at rates not less than the said rates during the said periods, defendant has violated and is violating the provisions of Sections 6 and 15 (a) (2) of the Act.

VI

During the period beginning October 24, 1938, the effective date of Section 7 (a) (1) of the Act, and repeatedly thereafter through October 23, 1939, defendant employed many of its aforesaid employees, who were engaged in the purchasing, handling, transporting, sale and distribution of goods in interstate commerce, as aforesaid, for workweeks longer than forty-four (44) hours, and did fail and refuse to compensate the said employees for their employment in excess of forty-four (44) hours in such workweek at rates not less than one and one-half times the regular rates at which they were employed, and, in fact, did fail and refuse to compensate them for such excess hours at any rates greater than the regular rates at which they were employed; and, during the period beginning October 24, 1939, the effective date of Section 7 (a) (2) of the Act, and repeatedly thereafter through October

23, 1940, defendant employed many of its aforesaid employees who were engaged in the purchasing, handling, transporting, sale and distribution of goods in interstate commerce, as aforesaid, for workweeks longer than forty-two (42) hours, and did fail and refuse to compensate the said employees for their employment in excess of forty-two (42) hours in such workweeks at rates not less than one and one-half times the regular rates at which they were employed; and, during the period beginning October 24, 1940, the effective date of Section 7 (a) (3) of the Act, and repeatedly thereafter, defendant has employed many of its aforesaid employees, who were engaged in the purchasing, handling, transporting, sale and distribution of goods in interstate commerce, as aforesaid, for workweeks longer than forty (40) hours, and has failed and refused to compensate the said employees for their employment in excess of forty (40) hours in such workweeks at rates not less than one and one-half times the regular rates at which they were employed, and, in fact, has failed and refused to compensate them for such excess hours at any rates greater than the regular rates at which they were employed. By employing the said employees for workweeks in excess of the said hours during the said periods without compensating them for their employment in excess of the said hours in such workweeks at rates not less than one and one-half times the regular rates at which they were employed, defendant has violated and is violating the provisions of Sections 7 and 15 (a) (2) of the Act.

VII

During the period beginning on or about October 24, 1938, and repeatedly thereafter, defendant has sold, shipped, delivered, transported, and offered for transportation in interstate commerce from points within the State of Louisiana to, into, and through other States than the State of Louisiana, goods stored and handled in its said place of business, in the handling and storing of which many of its employees were employed in violation of Sections 6 and 7 of the Act, as alleged in Paragraphs V and VI hereof. By selling, shipping, delivering, transporting, and offering for transportation in interstate commerce, as aforesaid, the said goods so handled, defendant has violated and is violating the provisions of Section 15 (a) (1) of the Act.

VIII

On October 21, 1938, the Administrator of the Wage and Hour Division, United States Department of Labor, pursuant to the authority conferred upon him by Section 11 (c) of the Act,

duly issued and promulgated regulations prescribing the records of persons employed and of wages, hours, and other conditions and practices of employment to be made, kept, and preserved by every employer subject to any provision of the Act. The said regulations, and amendments thereto, were published in the Federal Register and are known as Title 29, Chapter V, Code of Federal Regulations, Part 516.

IX

During the period beginning October 24, 1938, and repeatedly thereafter, defendant, an employer subject to the provisions of the Act and to the regulations referred to in Paragraph VIII hereof, has failed and refused to make, keep, and preserve, as prescribed by said regulations, adequate records of the persons employed by it and of the wages, hours, and other conditions and practices of employment maintained by it, in that the records made, kept, and preserved by the defendant fail to show adequately, among other things, the hours worked each workday and each workweek, the regular rate of pay and the basis upon which wages are paid; the wages at the regular rate of pay for each workweek (excluding extra compensation attributable to the excess of the overtime rate over the regular rate), and the extra wages for each workweek attributable to the excess of the overtime rate over the regular rate, with respect to many of its said employees. By failing and refusing to make, keep, and preserve adequate records as prescribed by the said regulations, defendant has violated and is violating the provisions of Section 11 (c) and 15 (a) (5) of the Act.

7

X

During the period beginning October 24, 1938, and repeatedly thereafter, defendant, an employer subject to the provisions of the Act and to the regulations referred to in Paragraph VIII hereof, has made and recorded or caused to be made and recorded in its records of persons employed by it and of the wages and hours of employment maintained by it, entries concerning hours worked by many of its employees, which entries are inaccurate and do not comply adequately with the requirements of the Act and of said regulations. By making and recording, or causing to be made and recorded in its said records, the said inaccurate and inadequate entries, defendant has violated and is violating the provisions of Sections 11 (c) and 15 (a) (5) of the Act.

XI

Since October 24, 1938, defendant has discharged and in other manner discriminated against certain of its employees because such employees filed complaints, instituted and caused to be instituted suits and other proceedings under or related to the Act and have testified or were about to testify in such suits or proceedings. By discharging or in other manner discriminating against such employees as aforesaid, defendant has violated and is violating Section 15 (a) (3) of the Act.

XII

Defendant has, since the effective date thereof, repeatedly violated the aforesaid provisions of the Act. A judgment enjoining and restraining the violations hereinabove alleged is specifically authorized by Section 17 of the Act.

8 Wherefore, cause having been shown, plaintiff demands judgment enjoining and restraining defendant, its officers, agents, servants, employees, and attorneys, and all persons acting or claiming to act in its behalf and interest, from violating the provisions of Section 15 (a) (1), 15 (a) (2), 15 (a) (3), and 15 (a) (5) of the Act, both permanently and during the pendency of this action, and such other and further relief as may be necessary and appropriate.

(Signed) WARNER W. GARDNER,
Warner W. Gardner,
Solicitor,

(Signed) IRVING J. LEVY,
Irving J. Levy,
Assistant Solicitor,
In Charge of Litigation.

(Signed) JEROME A. COOPER,
Jerome A. Cooper,
Regional Attorney,

(Signed) RICHARD C. KEENAN,
Richard C. Kennan,
Associate Attorney, United States Department of Labor,
Attorneys for Plaintiff.

Post Office Address: % Wage and Hour Division, U. S. Department of Labor, 916 Union Building, New Orleans, Louisiana, or % Wage and Hour Div., U. S. Department of Labor, Washington, D. C.

9 In United States District Court

Motion to dismiss claim, or in the alternative for a bill of particulars

Filed February 16, 1942

The defendant moves the Court as follows:

1. To dismiss the action because the complaint fails to state a claim against the defendant upon which relief can be granted.

2. In the alternative and only if the Court should determine that the complaint states a claim against the defendant upon which relief can be granted, then for a bill of particulars and more definite statement of the violations of the Fair Labor Standards Act alleged to have been committed by the defendant. That the allegations of the complaint are so vague, general, indefinite and unrevealing as to make it impossible for defendant to prepare his responsive pleading or his trial. That to remedy these deficiencies in averments, and to particularize instances of alleged violations, enabling the defendant to properly prepare responsive pleadings and for trial, the Court should order the plaintiff to make his complaint more definite in the following particulars, to-wit:

1. To furnish the names of the employees who were paid less than twenty-five cents and thirty cents per hour from and after October 24, 1939, and October 24, 1939, respectively, as alleged in paragraph V of the complaint.

2. To specify the particular workweeks plaintiff claims the respective employees referred to in paragraph V of said complaint were paid wages at rates less than the minimum prescribed by the Fair Labor Standards Act of 1938.

10 3. To furnish the names of employees who were not compensated at the overtime rates for hours worked in excess of the maximum hours prescribed by the Fair Labor Standards Act of 1938, as claimed in paragraph VI of said complaint.

4. To allege the particular workweeks that plaintiff claims the employees referred to in paragraph VI were employed in excess of the maximum hours prescribed by the act without payment of overtime compensation.

5. To specify to whom and on what dates the shipments, deliveries and sales referred to in paragraph VII of the complaint were made.

6. To furnish the names of the employees engaged in the handling and storing of the goods referred to in paragraph VII of the complaint.

7. To furnish the names of the employees and the particular workweek of each such employee as to which plaintiff claims that

the record kept by the defendant failed to show the hours worked each workday and each workweek, the regular rate of pay and the basis upon which wages are paid, the wages at the regular rate of pay for each workweek, and the extra wages for each workweek attributable to the excess of the overtime rate over the regular rate, all as set forth in paragraph IX of said complaint.

8. To specify in detail how the records kept by the defendant were not adequate and in conformity with the regulations prescribed, and to specify in detail the conditions and practices of employment referred to in paragraph IX of the complaint.

9. To furnish the names of the employees involved and in what respects the entries on defendant's records are inaccurate
11 and failed to comply with the requirements of said Act and that of the regulations promulgated thereunder, as alleged in paragraph X of the complaint.

10. To furnish the names of the employees alleged to have been discriminated against, and to specify in what manner and on what dates the alleged discrimination set forth in paragraph XI of the complaint occurred.

NORMANN & ROUCHELL and
JAMES E. BROWN,
Attorneys for Defendant,

By (Sgd.) F. NORMANN,
Trial Attorney.

1605 Hibernia Bldg., New Orleans, Louisiana.

Notice of motion

To RICHARD C. KEENAN, Esq.,
Attorney for Plaintiff,
U. S. Department of Labor,
916 Union Building, New Orleans, La.

Please take notice that the undersigned will bring the above motion on for hearing before this Court at United States Post Office Building, City of New Orleans, on the 25th day of February, 1942, at 10:00 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

(Sgd.) F. NORMANN,
Attorneys for Defendant.

12 In United States District Court

Order overruling motion to dismiss and granting motion for bill of particulars

February 25, 1942

BORAH, J.:

This cause came on this day for hearing on motion of defendant to dismiss claim, or, in the alternative, for a Bill of Particulars.

Whereupon, after hearing argument of counsel for the respective parties, and on consideration thereof,

It is Ordered by the Court that the motion to dismiss be, and it hereby is, overruled, and it is further Ordered that the motion for a Bill of Particulars be, and it hereby is, granted, plaintiff to furnish said Bill of Particulars within ten days from date.

13 In United States District Court

Bill of particulars

Filed March 6th, 1942

Now comes plaintiff, and in response to the Court's order, dated February 25, 1942, furnishes defendant with the particulars requested by it.

1. The following employees of defendant were paid less than twenty-five cents (25¢) per hour from October 24, 1938, to October 24, 1939: Henry Murray, Chester Moss, August Johnson, Victor Norman, Frank Pillitteri, Frank Hood and other employees of defendant who may be found to have been employed at rates less than twenty-five cents (25¢) per hour during the above-mentioned period.

The following employees of defendant were paid less than thirty cents (30¢) per hour subsequent to October 24, 1939: Henry Murray, Chester Moss, August Johnson, Victor Norman, Frank Pillitteri, Frank Hood, Ralph Blond, Arthur Joseph

14 Morgan, Joseph Parker, Gabe Searcy, and other employees of defendant who may be found to have been employed at rates less than thirty cents (30¢) per hour during the period subsequent to October 24, 1939.

2. Henry Murray was employed at sum-minimum rates during all workweeks from October 24, 1938, through July 20, 1940, except the workweeks ending February 25, 1939, May 20, 1939, May 27, 1939; June 3, 1939, June 10, 1939, July 8, 1939, July 22, 1939, August 26, 1939, and March 30, 1940, and other workweeks

which this employee may be found to have been employed at subminimum rates by defendant.

Chester Moss was employed at subminimum rates during all workweeks from October 24, 1938, through October 5, 1940, and any other workweeks during which this employee may be found to have been employed by defendant at subminimum rates.

August Johnson was employed at subminimum rates during all workweeks from October 24, 1938, through August 24, 1940, except the workweeks ending November 11, 1939, January 6, 1940, February 17, 1940, and February 24, 1940, and any other workweeks which this employee may be found to have been employed at subminimum rates by defendant.

Victor Norman was employed at subminimum rates during all workweeks from October 24, 1938, through October 5, 1940, except the workweeks ending November 11, 1939, January 6, 1940, February 10, 1940, February 17, 1940, February 24, 1940, March 2, 1940, March 9, 1940, and March 16, 1940, and any other workweeks during which this employee may be found to have been employed by defendant at subminimum rates.

15 Frank Pillitteri was employed at subminimum rates during all workweeks from October 24, 1938, through September 30, 1939, except the workweek ending January 14, 1939, and any other workweeks which this employee may be found to have been employed by defendant at subminimum rates.

Frank Hood was employed at subminimum rates during all workweeks from on or about April 1, 1940, through on or about December 31, 1940, and any other workweeks during which this employee may be found to have been employed by defendant at subminimum rates.

Ralph Blond was employed at subminimum rates during all workweeks subsequent to January 1, 1940, and any other workweeks which this employee may be found to have been employed by defendant at subminimum rates.

Arthur Joseph Morgan was employed at subminimum rates during all workweeks subsequent to on or about November 1, 1940, except the workweeks ending March 21, 1941, April 4, 1941, May 23, 1941, and June 27, 1941, and any other workweeks which this employee may be found to have been employed by defendant at subminimum rates.

Joseph Parker was employed at subminimum rates during all workweeks subsequent to on or about August 30, 1941, to date, and any other workweeks which this employee may be found to have been employed by defendant at subminimum rates.

Gabe Searcy was employed at subminimum rates during all workweeks subsequent to on or about January 1, 1941, and any

other workweeks which this employee may be found to have been employed by defendant at subminimum rates.

16 3. The following employees were not properly compensated by defendant for overtime hours worked in excess of the maximum hours prescribed by the Fair Labor Standards Act of 1938, as alleged in paragraph VI of the complaint: Henry Murray, Chester Moss, August Johnson, Victor Norman, Frank Pillitteri, Frank Hood, Ralph Blond, Arthur Joseph Morgan, Joseph Parker, Gabe Searcy.

4. Henry Murray was not properly compensated by defendant for overtime hours worked in excess of the statutory maximum during all workweeks between October 24, 1938, and July 20, 1940, except the workweek ending August 26, 1939, and all workweeks during which this employee may be found to have been employed in excess of the statutory minimum without extra compensation for overtime.

Chester Moss was not compensated by defendant for overtime hours worked in excess of the statutory maximum during all workweeks between October 24, 1938, and October 12, 1940, and all workweeks during which this employee may be found to have been employed in excess of the statutory minimum without extra compensation for overtime.

17 August Johnson was not compensated by defendant for overtime hours worked in excess of the statutory maximum during all workweeks between October 24, 1938, and August 24, 1940, except the workweeks ending February 17, 1940, and February 24, 1940, and all workweeks during which this employee may be found to have been employed in excess of the statutory minimum without extra compensation for overtime.

Victor Norman was not compensated by defendant for overtime hours worked on excess of the statutory maximum during all workweeks between October 24, 1938, and October 5, 1940, except the workweeks ending February 3, through February 16, 1940, inclusively, and all workweeks during which this employee may be found to have been employed in excess of the statutory minimum without extra compensation for overtime.

Frank Pillitteri was not compensated by defendant for overtime hours worked in excess of the statutory maximum during all workweeks between October 24, 1938, and September 30, 1939, except the workweek ending January 14, 1939, and all workweeks during which this employee may be found to have been employed in excess of the statutory minimum without extra compensation for overtime.

Frank Hood was not compensated by defendant for *over*-overtime hours worked in excess of the statutory maximum during all workweeks between on or about April 1, 1940, through on

or about December 31, 1940, and all workweeks during which this employee may be found to have been employed in excess of the statutory minimum without extra compensation for overtime.

Ralph Blond was not compensated by defendant for overtime hours worked in excess of the statutory maximum during
18 all workweeks subsequent to January 1, 1940, and all workweeks during which this employee may be found to have been employed in excess of the statutory minimum without extra compensation for overtime.

Arthur Joseph Morgan was not compensated by defendant for overtime hours worked in excess of the statutory maximum during all workweeks subsequent to on or about November 1, 1940, except the workweeks ending March 21, 1941, and April 4, 1941, and all workweeks during which this employee may be found to have been employed in excess of the statutory minimum without extra compensation for overtime.

Joseph Parker was not compensated by defendant for overtime hours worked in excess of the statutory maximum during all workweeks subsequent to on or about August 30, 1941, to date, and all workweeks during which this employee may be found to have been employed in excess of the statutory minimum without extra compensation for overtime.

Gabe Searcy was not compensated by defendant for overtime hours worked in excess of the statutory maximum during all workweeks subsequent to on or about January 1, 1941, and any other workweeks during which this employee may be found to have been employed in excess of the statutory minimum without extra compensation for overtime.

5. Shipments, sales, and deliveries referred to in paragraph VII of the complaint were made by defendant to the following firms, corporations, and individuals on the following dates:

19

Douglas Brothers, Birmingham, Ala	5- 4-41
Catanzano Brothers, Birmingham, Ala	6- 3-41
Catanzano Brothers, Birmingham, Ala	6-14-41
Catanzaro Brothers, Birmingham, Ala	6-14-41
Jack Hurley Produce Co., Birmingham, Ala	6-18-41
Catanzaro Brothers, Birmingham, Ala	6-14-41
Jack Hurley Produce Co., Birmingham, Ala	6-24-41
Jitney Jungle No. 6, Jackson, Miss	1- 2-42
Community Stores, Jackson, Miss	1- 2-42
Jitney Jungle No. 12, Jackson, Miss	1- 2-42
Jitney Jungle No. 4, Jackson, Miss	1- 2-42
Jitney Jungle, Jackson, Miss	11- 6-41
Jitney Jungle No. 6, Jackson, Miss	11- 6-41
Jitney Jungle No. 14, Jackson, Miss	10-31-41

	Green & Milam, Atlanta, Ga	5- 7-41
	B. N. Griggs, Montgomery, Ala	6-11-41
	Green & Milam, Atlanta, Ga	6-11-41
	Variety Seafood Co., Montgomery, Ala	6-11-41
	King's Self Service, Columbus, Ga	6-11-41
	Michael Brothers, Rosedale, Miss	6-17-41
	C. Engels Sons, Washington, D. C	6-19-41
	Piggly Wiggly, Rosedale, Miss	6-19-41
	Stedman Co., Beaumont, Tex	6-21-41
	Stedman Co., Lake Charles, La	6-21-41
	Crenshaw Bros. Produce Co., Tampa, Fla	6-21-41
	M. P. Wilcox, Montgomery, Ala	6-21-41
	Pickwick Cafe, Montgomery, Ala	12- 9-41
	Fitch Wilkinson, Inc., Jacksonville, Fla	6-27-41
	W. M. Ware, Jackson, Miss	7- 3-41
	McCullough Bros., Atlanta, Ga	7- 9-41
	Crenshaw Bros. Prod. Co., Tampa, Fla	7- 9-41
	Gilsters Wholesale Grocery, Selma, Ala	7- 9-41
	Michael Bros., Rosedale, Miss	7-15-41
	Pickwick Cafe, Montgomery, Ala	12- 9-41
	Warby Fruit & Produce Co., Mobile, Ala	1- 2-42
	Piggly Wiggly, Rosedale, Miss	12-30-41
	The Perry Store, Meridian, Miss	12-23-41
	Atlantic Comm. Co., Houston, Tex	12-23-41
20	Pickwich Cafe, Montgomery, Ala	12-16-41
	Morske Prod. Co., St. Louis, Mo	12-16-41
	Atlanta Comm. Co., Houston, Tex	12- 9-41
	Variety Seafood Co., Montgomery, Ala	12- 9-41
	Pickwick Cafe, Montgomery, Ala	12- 9-41
	S. V. Cefalu, Atlanta, Ga	12- 9-41
	Heidelburg Hotel, Jackson, Miss	12- 1-41
	Geo. A. Ryder Co., Galveston, Tex	12- 1-41
	Barry Comm. Co., St. Louis, Mo	11-17-41
	Mayflower Cafe, Jackson, Miss	11-17-41
	Barry Comm. Co., St. Louis, Mo	11-17-41
	Atlantic Comm. Co., Houston, Tex	11-17-41
	Variety Seafood Co., Montgomery, Ala	11-10-41
	Jake Werfel, Montgomery, Ala	11- 5-41
	Variety Seafood Co., Montgomery, Ala	10-23-41
	Gilster Wholesale Grocery, Selma, Ala	10-16-41
	Adler's Food Store, San Antonio, Tex	10-16-41
	Jack Hurley Prod. Co., Birmingham, Ala	10- 6-41

Petitioner shows that since October 24, 1938, daily shipments have been made and are being made to the above-mentioned concerns or other concerns located without the State of Louisiana.

6. The following employees were engaged in the handling and storing of goods referred to in paragraph VII of the Complaint: Henry Murray, Chester Moss, August Johnson, Victor Norman, Frank Pillitteri, Frank Hood, Ralph Blond, Arthur Joseph
21 Morgan, Joseph Parker, Gabe Searcy, and any other employees who may be found to have been employed by defendant in the handling and storing of goods.

7. The records maintained by defendant failed to show the hours worked each workday and each workweek, the regular rate of pay and basis upon which wages are paid, the wages at the regular rate of pay for each workweek, and the extra wages for each workweek attributable to the excess of the overtime rate over the regular rate as to the following named employees: Henry Murray, Chester Moss, August Johnson, Victor Norman, Frank Pillitteri, Frank Hood, Ralph Blond, Arthur Joseph Morgan, Joseph Parker, Gabe Searcy.

8 and 9. Records kept as to each of the employees named in the preceding paragraph and as to other employees of defendant are inaccurate and inadequate in that prior to on or about September 1940, no record was maintained of hours worked by the day or by the week, and that since that date the records are inadequate and inaccurate in that they do not correctly record the actual number of minimum and overtime hours worked each day and each workweek, nor correctly record the minimum and overtime rates of pay, nor accurately record the wages paid at the regular rate,
22 nor accurately record the extra wages for each workweek attributable to the excess of the overtime rate over the regular rate, nor accurately record the total wages paid; that such violations have been continuous from October 24, 1938, to date.

10. Henry Murray and August Johnson were discharged by defendant during the course of an investigation by the Wage and Hour Division, United States Department of Labor, for the reason that they refused to sign a statement prepared by defendant concerning their employment with defendant, which statement was an untrue statement of the facts concerning said employment, and because they insisted upon their right to unpaid compensation due under the Fair Labor Standards Act, and for the further reason that they had testified before a representative of the Wage and Hour Division, and during the course of this proceeding had complained of violations of the Fair Labor Standards Act by their employer as to their employment with defendant.

Chester Moss was fired for making a demand through an attorney upon defendant for the unpaid compensation due him under the Fair Labor Standards Act.

Henry Murray and August Johnson were discharged on *on* or about August 28, 1940, and Chester Morris was *dis-* discharged on or about October 8, 1940, and the discriminatory actions for which these employees were fired occurred just prior to their discharge.

(Signed) WARNER W. GARDNER,
Solicitor.

(Signed) ROY C. FRANK,
Assistant Solicitor.

23 (Signed) JEROME A. COOPER,
Regional Attorney.

(Signed) RICHARD C. KEENAN.
Associate Attorney.

Post Office Address: c/o Wage and Hour Division, U. S. Department of Labor, 916 Union Building, New Orleans, Louisiana, or c/o Wage and Hour Division, U. S. Department of Labor, Washington, D. C.

Served by mailing a copy to Normann & Rouchell, Attorneys at Law, Hibernia Bank Building, New Orleans, Louisiana, on March 6, 1942.

(Signed) RICHARD C. KEENAN.

In United States District Court

Motion to strike parts of complaint, etc.

Filed March 14th, 1942

The defendant moves the Court as follows:

To strike from amongst the allegations in plaintiff's complaint, as supplemented by the bill of particulars, all allegations of violations of the Fair Labor Standards Act alleged to have occurred prior to January 23, 1941, which date is one year prior to the filing of this complaint, and in particular to strike the hereinafter particularized allegations in plaintiff's complaint.

24 That the hereinafter particularized allegations and all other allegations pertaining to alleged violations of the Fair Labor Standards Act prior to January 23, 1941, or occurring more than one year before this complaint was filed are immaterial and impertinent, and have no possible bearing upon the subject matter of this litigation, which is the issuance of an injunction to restrain alleged existing violations of said Act.

That the presence in plaintiff's complaint of the allegations referred to above, are prejudical to the interests of the defendant, and only tend to cloud the real issue before the Court at this time.

That the particular allegations in plaintiff's complaint and bill of particulars which should be stricken as immaterial to the issue and prejudicial to the defendant are as follows:

1. The allegations in paragraph 1 of plaintiff's bill of particulars.

2. The allegations of paragraph 2 of plaintiff's bill of particulars except insofar as they refer to employees Ralph Blond, Arthur Joseph Morgan, Joseph Parker, and Gabe Searcy concerning alleged violations subsequent to January 23, 1941.

3. The allegations of paragraphs 3 and 4 of plaintiff's bill of particulars, except insofar as they refer to employees Ralph Blond, Arthur Joseph Morgan, Joseph Parker, and Gabe Searcy concerning alleged violations of the Fair Labor Standards Act subsequent to January 23, 1941.

4. The allegations of paragraph 6 of the plaintiff's bill of particulars except insofar as they refer to the work performed by employees Frank Hood, Ralph Blond, Arthur Joseph Morgan, Joseph Parker, and Gabe Searcy, subsequent to January 23, 1941.

5. The allegations of paragraph 7 of the plaintiff's bill of particulars except insofar as they refer to records covering work performed subsequent to January 23, 1941.

6. The allegations of paragraphs 8 and 8 of plaintiff's bill of particulars except insofar as they refer to alleged violations subsequent to January 23, 1941.

7. All of the allegations of paragraph 10 of plaintiff's bill of particulars, as referring to incidents prior to January 23, 1941.

8. The allegations of paragraphs V, VI, and VII of the original complaint except insofar as they refer to alleged violations subsequent to January 23, 1941.

9. The allegations of paragraphs IX, X, and XI of the original complaint except insofar as they might refer to alleged violations occurring subsequent to January 23, 1941.

Defendant further moves the Court that it be given additional time to file an answer in this matter after the motion to strike is heard and disposed of, and that an adjudication upon the merits of this claim be deferred until such time has elapsed, in accordance with the requirements of Rule 12 (a) of the Federal Rules of Civil Procedure.

NORMANN & ROUCHELL and
JAMES E. BROWN,
Attorneys for Defendant,

By (Sgd.) F. NORMANN,
Trial Attorney.

1605 Hibernia Bldg., New Orleans, Louisiana.

26 *Notice of motion*

To Mr. Richard C. Keenan, Esq.,
Attorney for Plaintiff,
U. S. Department of Labor,
916 Union Building, New Orleans, Louisiana.

Please take notice that the undersigned will bring the above motion on for hearing before this Court, United States Post Office Building, City of New Orleans, on Wednesday, the 25th day of March, 1942, at 10:00 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

Normann & Rouchell and
James E. Brown,
By (Sgd.) F. Normann,
Attorneys for Defendant.

In United States District Court

Order overruling motion to strike

March 25, 1942

Borah, J.:

This cause came on this day to be heard on defendant's motion to strike certain allegations of plaintiff's complaint and of plaintiff's bill of particulars.

27 Whereupon, after hearing argument of counsel for respective parties and on consideration thereof,

It is ordered, that the motion to strike be and hereby is denied.

In United States District Court

Order for substitution of party plaintiff

Filed March 25th, 1942

The parties hereto having stipulated that L. Metcalfe Walling, Administrator of the Wage and Hour Division of the United States Department of Labor, be substituted as party plaintiff herein in the place and stead of Thomas W. Holland, it is

Ordered that L. Metcalfe Walling, as Administrator of the Wage and Hour Division of the United States Department of Labor, be and hereby is substituted as plaintiff herein in the place and stead of Thomas W. Holland without prejudice to the proceedings already had in this action and that this cause may be

continued and maintained by said L. Metcalfe Walling as successor in office of said Thomas W. Holland.

Dated March 25, 1942.

(Signed) WAYNE G. BORAH,
District Judge.

28 In United States District Court

Answer

Filed March 31, 1942

Now comes defendant, and with full reservation of its plea of prescription hereinafter urged to any and all alleged violations occurring or admitted to have existed for more than one (1) year prior to the filing of this suit, for the purpose of responding to plaintiff's complaint, as supplemented by the bill of particulars, respectfully represents:

1. Your respondent denies each and every allegation of the complaint, as supplemented by the bill of particulars, save and except those allegations pertaining to the Court's jurisdiction; respondent's corporate existence; the names and number of respondent's present and ex-employees; merchandise shipments, and such other facts as may be hereafter admitted, subject to the prescriptive plea made herein.

2. Defendant further avers, for more than one year prior to the filing of this suit, it changed its method of keeping its records and conformed its practice, insofar as its covered employees are concerned, in accordance with certain suggestions and recommendations of the representatives of the Wage and Hour Division, to more fully comply with the regulations promulgated by the administrator of the Wage and Hour Division.

3. In the alternative defendant avers, any alleged violation of the statute or the regulations promulgated by the Wage
29 and Hour Administrator, and during the effective period thereof, which it may have committed, occurred more than one year prior to the institution of the present suit, was inadvertent and unintentional, and is subject to the plea of one year prescription, which defendant specially pleads in bar of any action thereon.

4. Further answering defendant avers, for more than one year prior to the filing of this suit, it has and is now conforming its records and practice to and in accordance with the regulations promulgated by the administrator of the Wage and Hour Division and in accordance with the Fair Labor Standards Act, insofar as its covered employees are concerned, and that it has

no intention not to comply with said Act in the future, and that it verily believes its practice fully conforms to the requirements of the statute.

Wherefore, defendant demands:

I. That there be judgment rendered in favor of defendant, James V. Reuter, Inc., and against plaintiff, L. Metcalfe Walling, Administrator, Wage and Hour Division, United States Department of Labor, rejecting plaintiff's demands, and dismissing this suit without costs to defendant.

II. For all such additional relief as law, equity, and the nature of the case may require or allow.

By F. NORMANN,
A Member of the Firm.
NORMANN & ROUCHELL,
Attorneys for Defendant.
Suite 1605 Hibernia Building, New Orleans, Louisiana.

30 In United States District Court

Findings of Fact

Filed March 31, 1943

BORAH, District Judge:

This is a suit brought by the Administrator to enjoin respondent from violating provisions of the Fair Labor Standards Act of 1938, 52 Stat. 1060, 29 U. S. C. Section 201. The material facts are these:

FINDINGS OF FACT

1. The defendant is, and at all times since October 24, 1938, the effective date of the minimum wage, overtime compensation, and record-keeping requirements established by the Fair Labor Standards Act of 1938 (52 Stat. 1060; 29 U. S. C. Sec. 201, et seq.), hereinafter referred to as the Act, has been a corporation existing by virtue of the laws of the State of Louisiana, with its principal office and place of business at 817 Decatur Street, New Orleans, Louisiana, where it engages in purchasing, receiving, handling, selling, and distributing, at wholesale, fresh vegetables, fruits, and similar produce. Defendant employs from 10 to 15 employees, including office help, warehousemen, truck drivers, and laborers in carrying on its business.

2. Defendant purchases approximately 50% of the produce handled by it from out-of-State sources. These produce are
31 usually shipped to it by railroad, in carload and half-carload lots, and the refrigerated cars carrying the goods

are switched to a siding approximately one block from defendant's place of business, known as the "Reuter Switch." An average of twelve to twenty freight cars a month, carrying produce consigned to defendant, arrive at the "Reuter Switch" from points outside of the State of Louisiana.

3. All of the vegetables and produce arriving from out-of-State sources are unloaded from the freight cars and brought to defendant's place of business to be uncrated and examined before being sold. Defendant's employees, principally a carman and truckdrivers and occasionally warehousemen unload the produce from the freight cars and truck it to defendant's place of business. The carman spends the greater portion of his time engaged in the unloading operations. Truck drivers usually spend one and one-half hours a day, sometimes longer, in unloading freight cars and hauling the produce to defendant's place of business.

4. Defendant sells its produce to other wholesalers and to retail merchants in Louisiana and other States. Though the bulk of goods is sold to local merchants, substantial out-of-State sales amounting to approximately 5% of the total yearly sales are made to out-of-State customers. In the year 1939, out of total sales amounting to $201,829.00, the sales to out-of-State customers amounted to $11,450.00. In the year 1940, total sales aggregated $198,994.00, with out-of-State sales amounting to $15,885.00. In 1941 and 1942, total sales aggregate $245,084.00 and $448,758.00, respectively, while out-of-State sales for those years were $12,028.00 and $18,915.00.

5. Defendant's warehouse employees sort, select, repackage, and handle produce received without distinction as to its ultimate destination. Orders are made up from stock on hand, and an average of twelve a day are shipped to out-of-State customers. Usually a Railway Express Company truck comes by defendant's place of business each day, and the out-of-State orders are loaded thereon by the defendant's employees.

32

6. In the normal course of its business, defendant also sells substantial amounts of vegetables and produce to ship chandlers. Such sales occur every week. The ship chandlers purchase the produce to provision boats for oceangoing voyages, and usually in amounts sufficient to last until the boats reach their next port of call. The bulk of the produce purchased by ship chandlers is picked up by them in their own trucks at defendant's place of business. However, defendant's own truck drivers frequently deliver orders for boats docked in the New Orleans Harbor. Sometimes these orders are just unloaded at the docks, sometimes they are unloaded onto runners and onto winches and immediately pulled or hoisted aboard the boat. On rare occasions

the defendant's employees carry the produce on the boats themselves. The ship chandlers who purchase these produce do not specifically advise defendant of the destination and proposed use thereof.

7. Because of their perishable nature, there is a very rapid turnover of the produce and goods handled by defendant. In general, all goods received from out-of-State sources are unloaded, examined, sorted, repackaged, sold and delivered within one to five days after they are acquired by defendant. This rapidity of movement is exemplified by defendant's custom of using the refrigerated freight cars in which goods are received as a temporary night storage place for produce that may be on hand at the end of the day. The freight cars are always fully unloaded and released within two to five days after arrival.

8. During the period from October 24, 1938, to July, 1940,
33 defendant paid many of its employees rates less than the prevailing minima of 25¢ and 30¢ per hour specified by the Act. Defendant's books during this period show only the total weekly salaries paid to employees. The hours worked by warehousemen, carmen, and truckdrivers, ranging from 55 to 75 hours a week were far in excess of what their salaries would cover at the minimum rates prescribed by the Act.

After July 1940, defendant's records were changed and purported to show that employees received at least the minimum wage for all hours worked. However, I find that employees worked longer hours than were credited to them on defendant's books and as a consequence still were receiving less than the minimum wage prescribed.

9. From October 24, 1938, until July 1940, defendant paid no additional amounts for overtime compensation for hours in excess of 44 and 42 per week. Office and warehouse employees who were entitled to overtime compensation because of the long hours they worked during this period received none.

After July 1940, defendant's books purport to show overtime payments to some employees but since employees worked longer hours than they were credited with by defendant their compensation did not adequately cover the overtime work done by them at the overtime rate prescribed by the Act.

10. From October 24, 1938, until July 1940, defendant kept no daily or weekly records of the hours worked by its employees as required by the Administrator's Regulations.

After July 1940, defendant kept what purported to be time records for employees, but I find that employees were not actually credited with all hours which they worked.

34 11. As a result of several inspections made by the Wage and Hour Division during the period involved in this suit,

defendant was well aware of the provisions of the Fair Labor Standards Act. However, defendant has consistently contested the applicability of the Act to its employees and has taken the position in this suit that the coverage of the Act does not extend to a wholesaler operating its business in the manner in which the defendant operates.

Conclusions of law

1. The Court has jurisdiction of the parties hereto and of the subject matter of this action (29 U. S. C., Sec. 217).

2. Those employees of defendant who unloaded produce from freight cars coming from out-of-State sources; those who hauled such produce from the freight cars to defendant's place of business and there unloaded it;[1] those who prepared and shipped orders to out-of-State customers;[2] and those who prepared and delivered orders to ship chandlers for provisioning of vessels on their voyages[3] were intimately connected with and a part of commerce, as defined by Section 3 (b) of the Fair Labor Standards Act, and were engaged in commerce within the meaning of Sections 6 and 7 of said Act and entitled to the benefits thereof.

3. The employees of defendant who sorted, picked over, handled, packaged, and repackaged produce in defendant's place of business without regard to the final destination thereof, part of said goods being regularly shipped to out-of-State customers in the normal course of defendant's business, were producing goods for commerce within the meaning of Section 3 (j) of the Act and were entitled to the benefits of Sections 6 and 7 thereof.[4]

4. The fact that the ship chandlers to whom defendant sold produce did not specifically notify defendant that such produce was to be used for provisioning boats on their ocean-going voyages is not controlling. What is important is that defendant's employees spent a substantial portion of their time working on such goods which did move outside the State and defendant cannot escape the impact of the Act by a claim of ignorance where as here it had every reason to anticipate and expect that the goods would move from the State to a place outside thereof.[5]

5. Because of the rapidity in turnover of produce received from out-of-State sources due to their perishable nature and the defendant's method of handling them, there was a continuity of movement of such goods from out-of-State to defendant's customers, whether local or distant; and all employees of defendant were an

[1] Walling v Jacksonville Paper Co., — U. S. — (decided Jan. 18, 1943).
[2] Walling v. Goldblatt Bros. Inc., 128 F. (2d) 778; and see Fleming v. Enterprise Box Co., 125 F. (2d) 897, cert. den. 62 Sup. Ct. 1312; Hamlet Ice Co. v. Fleming, 127 F. (2d) 165, cert. den. 63 Sup. Ct. 29.
[3] Atlantic Company v. Walling, 131 F. (2d) 518.
[4] Fleming v. Kenton Looseleaf Tobacco Co., 41 F. Supp. 255.
[5] Warren-Bradshaw Drilling Co. v. Hall, — U. S. — (decided Nov. 9, 1942).

integral part of that movement and were engaged in commerce within the meaning of the Act.[6]

6. The Act applies generally to employees of an employer who handles goods without reference to their ultimate destination, some being selected for shipment interstate and some intrastate according to the daily demands of business.

Congress was not unaware that it would be practically impossible without disrupting the distribution business to restrict the application of the Act to those cases where a definite intention can be proved that particular pieces of goods, fruit, vegetables, or anything else shall move later on in interstate commerce.[7]

36 7. Employees of a wholesaler engaged in obtaining goods from points outside the State and distributing them to points in other States are engaged in the stream of interstate commerce and entitled to the benefits of the Fair Labor Standard Act.[8]

8. By paying its employees who were engaged in commerce and in the production of goods for commerce at rates less than the minima prescribed in the Act, defendant has violated Sections 6 and 15 (a) (2) of the Fair Labor Standards Act of 1938 (29 U. S. C. Secs. 206, 215 (a) (2)).

9. By paying its employees who were engaged in commerce and in the production of goods for commerce at rates less than one and one-half times the minimum rates prescribed by the Act, or less than one and one-half times their regular rate of pay, whichever was greater, for hours worked in excess of 44 hours per week from October 24, 1938, through October 23, 1939, and for hours worked in excess of 42 hours per week from October 24, 1939, to October 23, 1940, and for hours worked in excess of 40 hours per week thereafter, defendant has violated Sections 7 and 15 (a) (2) of the Fair Labor Standards Act of 1938 (29 U. S. C., Secs. 207, 215 (a) (2)).

10. By its failure to make, keep and preserve records setting forth the information required to be recorded by Regulations of the Administrator which became effective October 24, 1938, and amendments thereto; and, more particularly by its failure to record the hours worked each work day and each work week by each employee until July 1940, and by failing to credit employees for all hours worked thereafter, defendant violated the provisions of Secs. 11 (c) and 15 (a) (5) of the Fair Labor Standards Act of 1938 (29 U. S. C., Secs. 211 (c) and 215 (a) (5)).

37 11. By shipping to out-of-State customers goods produced by its employees who were receiving less than the minimum and overtime rates prescribed by the Fair Labor Stand-

[6] Walling v. Jacksonville Paper Co., Supra.
[7] United States v. F. W. Darby, 312 U. S. 100.
[8] Stafford v. Wallace, 258 U. S. 495.

ards Act, defendant violated Section 15 (a) (1) thereof (29 U. S. C. Sec. 215 (a) (1)).

12. Because of defendant's course of violations of the Act over a long period of time, and then mere semblance of compliance under official pressure of the Wage and Hour Division inspectors, coupled with defendant's present contention that the Act is not applicable to it; and upon the whole record, the plaintiff is entitled to the relief sought in the complaint herein.*

The plaintiff is entitled to injunction in accordance with the foregoing findings of fact and conclusions of law, and proper order and judgment providing therefor may be presented after notice.

New Orleans, Louisiana, March 31st, 1943.

(Signed) WAYNE G. BORAH,
U. S. District Judge.

In United States District Court

Judgment

Filed April 9th, 1943

The above styled cause came on regularly for trial before this Court sitting without a jury in New Orleans, Louisiana, on the 9th, 10th, and 11th days of February, 1943, plaintiff and defendant appearing by counsel; and trial having been had on issues
38 joined, the Court having heard and considered the oral testimony and documentary evidence adduced, and the cause having been submitted to the Court on the whole record therein and the arguments of counsel for the respective parties,

Now, therefore, sufficient reason therefor appearing and upon the Findings of Fact and Conclusions of Law made and filed herein on March 31, 1943, it is

Ordered, adjudged, and decreed, by the Court, that defendant, its agents, servants, employees and attorneys, and all persons acting or claiming to act in its behalf or interest, be and they are hereby permanently enjoined and restrained from violating the provisions of Sections 15 (a) (1), 15 (a) (2), and 15 (a) (5) of the Fair Labor Standards Act of 1938 (Act of June 25, 1938, c. 676, 52 Stat. 1060, U. S. C. Title 29, Sec. 201, et seq.), hereinafter referred to as the Act in any of the following manners:

(1) The defendant shall not, contrary to Section 6 of the Act, pay any of its employees who are engaged in commerce and in the production of goods for commerce, as defined by the Act, from the date of this judgment to October 24, 1945, wages at rates less than

* Walling v. Jacksonville Paper Company, supra.

thirty (30) cents an hour except to the extent that a lower wage rate is authorized by an applicable order of the Administrator issued under Section 8 (e) of the Act. The defendant shall not at any time pay to its above described employees wages at rates less than those prescribed in any applicable order of the Administrator issued pursuant to the provisions of Section 8 of the Act. The provisions of this paragraph shall not prevent defendant from paying to any of its employees wages authorized as to such employees by a special certificate issued and in effect under Section 14 of the Act.

(2) The defendant shall not, contrary to Section 7 of the Act, employ any of its employees engaged in commerce,
39 and in the production of goods for commerce, as defined by the Act, for a workweek longer than forty (40) hours, unless the employee receives compensation for his employment in excess of forty (40) hours at a rate not less than one and one-half times the regular rate at which he is employed.

(3) The defendant shall not fail to make, keep, and preserve records of its employees, and of the wages, hours, and other conditions and practices of employment maintained by it, as prescribed by the regulations of the Administrator issued, and from time to time amended, pursuant to Section 11 (c) of the Act, and found in Title 29, Chapter V, Code of Federal Regulations, part 516.

(4) The defendant shall not, contrary to Section 15 (a) (1) of the Act, ship, deliver, transport, offer for transportation, or sell in interstate commerce, defined by the Act, or ship, deliver, or sell with knowledge that shipment, delivery, or sale thereof in interstate commerce is intended, any goods in the production of which any employee of the defendant has been employed at rates of pay less than those specified in Paragraphs (1) and (2) of this judgment, and it is

Further Ordered, Adjudged, and Decreed, by the Court, that all costs and disbursements of this action shall be paid by defendant.

Dated April 9, 1943.

(Signed) WAYNE G. BORAH,
United States District Judge.

40 In United States District Court

Notice of appeal

Filed April 14th, 1943

Notice is hereby given that James V. Reuter, Inc., original defendant in the above numbered cause, and styled appellant herein,

hereby appeals to the United States Circuit Court of Appeals for the Fifth Circuit, from the decree entered herein on April 9th, 1943, enjoining appellant herein from violating Sections 15 (a) (1), 15 (a) (2) and 15 (a) (5) in the particulars therein stated and specified.

New Orleans, Louisiana, April 14th, 1943.

NORMANN & ROUCHELL and
CARLOS E. LAZARUS,
Attorneys for Appellant,

By (Sgd.) F. NORMANN,
A Member of the Firm.

1605 Hibernia Bank Building, New Orleans, Louisiana.

In United States District Court

Statement of points on which appellant intends to rely on appeal

Filed April 17th, 1943

Now into Court comes James V. Reuter, Inc., Appellant in the above styled and numbered cause, and as a basis for and in connection with this appeal, assigns the following points as error in the Decree of this Court enjoining said Appellant from
41 violating Sections 15 (a) (1), 15 (a) (2) and 15 (a) (5) of the Fair Labor Standards Act (29 U. S. C. A. Secs. 201, et seq.) in the particulars therein specified:

1. Error was committed in holding that Appellant and its employees are engaged "in commerce" within the definition of the Fair Labor Standards Act.

2. Error was committed in holding that Appellant and its employees are engaged in the "production of goods for commerce" within the definition of the Fair Labor Standards Act.

3. Error was committed in holding that Appellant's employees are entitled to the benefits of the Fair Labor Standards Act.

4. Error was committed in granting the injunction, in absence of any evidence showing violations for more than one year prior to trial.

Wherefore, appellant prays that the Decree herein rendered by this Court on April 9th, 1943, be reversed for the reasons herein assigned.

New Orleans, Louisiana, April 16th, 1943.

NORMANN & ROUCHELL and
CARLOS E. LAZARUS,
Attorneys for Appellant.

By (Sgd.) F. NORMANN,
A Member of the Firm.

1605 Hibernia Bank Building, New Orleans, Louisiana.

42 In United States District Court

Amended praecipe

Filed April 29th, 1943

Honorable A. DALLAM O'BRIEN, Jr.,
Clerk, United States District Court,
Eastern District of Louisiana, New Orleans, Louisiana.

DEAR MR. O'BRIEN: Please prepare the record on Appeal to the United States Circuit Court of Appeals for the Fifth Circuit in the above captioned cause in accordance with this amended praecipe and include in the said record the following:

(1) Bill of Complaint.
(2) Motion to dismiss claim, or in the alternative for a bill of particulars.
(3) Ruling on motion dated February 25th, 1942.
(4) Bill of particulars.
(5) Motion to strike.
(6) Ruling on motion to strike dated March 25th, 1942.
(7) Order for substitution of party-plaintiff.
(8) Answer.
(9) Findings of fact, conclusions of law and judgment.
(10) Notice of Appeal.
43 (11) Designation of points on which appellant intends to rely on appeal.
(12) This praecipe.

Dated at New Orleans, Louisiana, this 29th day of April 1943.

NORMANN & ROUCHELL,
By F. NORMANN,
A Member of the Firm,
Attorneys for James V. Reuter, Inc.

1605 Hibernia Bank Building, New Orleans, Louisiana.

44 [Clerk's certificate to foregoing transcript omitted in printing.]

45 [Supersedes bond on appeal for $5,000 approved and filed April 15, 1943, omitted in printing.]

47 In United States Circuit Court of Appeals,
Fifth Circuit

No. 10637

JAMES V. REUTER, INCORPORATED

vs.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR

Argument and submission

May 31, 1943

On this day this cause was called, and, after argument by Frank S. Normann, Esq., for appellant, and James H. Hynes, Esq., Acting Regional Attorney, United States Department of Labor, for appellee, was submitted to the Court.

48 In the United States Circuit Court of Appeals for the Fifth Circuit

No. 10637

JAMES V. REUTER, INCORPORATED, APPELLANT

vs.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, APPELLEE

Appeal from the District Court of the United States
for the Eastern District of Louisiana

Before HUTCHESON, HOLMES, and WALLER, Circuit Judges

Opinion

Filed July 22, 1943

WALLER, Circuit Judge: Appellant appeals from an injunction of the District Court restraining it from violating certain provisions of the Fair Labor Standards Act (29 U. S. C., Sec. 201, et seq.). The lower Court found that defendant was engaged
49 in purchasing, receiving, handling, selling, and distributing at wholesale fresh fruits, vegetables, and similar produce. Approximately fifty percent of the produce handled by appellant was purchased from outside the State of Louisiana and shipped to

the defendant by rail in refrigerated cars. The cars are delivered by the railroad company to the switch of the defendant, approximately one block from appellant's place of business, and the produce is ultimately unloaded by some of defendant's employees and trucked to the defendant's store where the produce is sorted, selected, prepared, and repackaged for sale. Approximately ninety-five percent of the defendant's sales are local and the other five per cent of the defendant's yearly sales are to customers in states other than Louisiana. Appellant's truck drivers also make delivery of produce to vessels in the harbor of New Orleans for the subsistence of the crews of such vessels, usually in amount sufficient to last until the next port is reached. The commodities handled by the appellant are perishable, the very nature of which requires rapid sale and disposition, and in the course of business are unloaded, examined, sorted, repackaged, sold, and delivered within one to five days. There is no dispute over the findings of fact by the lower Court.

The defendant claimed that it was not within the provisions of the Fair Labor Standards Act and, therefore, not required to comply with its provisions.

The Court below made a very broad injunctive order after reaching the following legal conclusions:

1. That the employees who unloaded produce from freight cars coming from out of the state; those who hauled produce from freight cars to defendant's place of business and unloaded it; those who prepared and shipped orders to out-of-state customers; those who prepared and delivered orders to local ship chandlers for provisioning of vessels on their voyages, were engaged in commerce within the meaning of Sections 206 and 207, 29 U. S. C.

2. That the employees of the defendant who sorted, picked over, handled, packaged, and repackaged produce in the defendant's place of business without regard to the final destination thereof, were producing goods for commerce within the meaning of the Act.

3. That those employees engaged in delivering goods to vessels were engaged in commerce within the meaning of the Act since the defendant had every reason to expect that the goods would move from the state to a place outside thereof.

4. Because of the rapidity in turnover of produce received from out of the state, due to the perishable nature and the defendant's method of handling same, there was a continuity of movement of such goods from out of the state to defendant's customers, whether local or distant, and that all employees of the defendant were a part of the movement and engaged in commerce within the meaning of the Act.

5. That the Act applies generally to employees who handle goods without reference to their ultimate destination, whether intrastate or interstate, according to the daily demands of the business.

6. That employees of a wholesaler engaged in obtaining goods from points outside of the state and delivering them to points in other states are engaged in commerce and entitled to the benefits of the Act.

7. That defendant, by paying its employees who were engaged in commerce and production of goods for commerce at rates
51 less than the minima prescribed by the Act, has violated Sections 206 and 215 (a) (2) of 29 U. S. C.

8. That by paying its employees less than time and one-half for overtime during the period involved, defendant has violated Sections 207 and 215 (a) (2) of 29 U. S. C.

9. By failing to make, keep, and preserve records setting forth information required by the regulations of the Administrator, and more particularly by failing to record the hours worked each day and each week by each employee, and by failing to credit employees for all hours worked, the defendant violated Sections 211 (c) and 215 (a) (5) of 29 U. S. C.

10. That by shipping to out-of-state customers goods produced by employees not paid according to the wage requirements of the Act, the defendant violated Section 215 (a) of 29 U. S. C.

An injunction in conformity with the foregoing conclusions was entered.

We are unable to agree with all of the legal conclusions of the lower Court. We do, however, agree that truck drivers and their helpers when engaged in unloading produce from freight cars coming from out of the State and when engaged for a substantial part of their time in hauling such produce from freight cars to defendant's place of business are within the coverage of Sec. 6 (Title 29, Sec. 206), or the minimum wage provision of the Act, but we hold that truck drivers are not subject to the overtime provisions of the Act. (See Southland Gasoline Company vs.
52 Bayley, — U. S. —, decided May 3, 1943; Walling, Administrator, vs. Silver Brothers Co. (First Cir.), — Fed. (2) —, decided May 21, 1943.)[1]

We further hold that employees, when engaged for a substantial part of their time in: (a) preparing, selling, shipping, or deliver-

[1] Sec. 13 (b) (Sec. 213 (b), Title 29, U. S. C.), provides:
"The provisions of section 7 shall not apply with respect to (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 304 of the Motor Carrier Act, 1935; or (2) any employee of an employer subject to the provisions of Part I of the Interstate Commerce Act."
Sec. 304 (a) (3), Title 49, provides that it shall be the duty of the Interstate Commerce Commission—
"(3) To establish for private carriers of property by motor vehicle, if need therefor is found, reasonable requirements to promote safety of operation, and to that end

ing for shipment, orders to out-of-state customers; (b) buying, ordering, paying for, keeping records on, goods purchased from out of the State, are within the coverage of both the minimum wage (Sec. 6) and overtime (Sec. 7) provisions of the Act
53 and should be paid not less than the minimum, with time and one-half for overtime, for each hour so engaged.[2] We also agree that the defendant should be required to keep accurate and adequate records as required by the Act and regulations promulgated thereunder.

We disagree with the legal conclusion of the lower Court that the defendant's employees were engaged in the production of goods for commerce, as held in Paragraph 3 of the conclusions of the Court below, hereinabove stated as Paragraph 2.

We disagree with the legal conclusions of Paragraph 4 of the Conclusions of the Court below, hereinabove stated as Paragraph 3, that the employees when packing, hauling, and delivering goods to vessels in the port of New Orleans for the provisioning of the crew were within the provisions of the Act, for the reason that the commodities so delivered were to be consumed by the crew of the vessel and were not to be either shipped, sold, or delivered in interstate commerce, but were delivered to the ultimate consumer, and, under Paragraph (1) of Section 203, Title 29, U. S. C.,[3] defining the meaning of "goods" covered by the Act, the food for the crews would be excluded. The vessel was not a producer, manufacturer, or processor, but was the ultimate consumer into whose hands the "actual physical possession" of the goods was delivered. It matters not, therefore, whether some portion of these goods survived until the vessels reached foreign waters or

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prescribe qualifications and maximum hours of service of employees, and standards of equipment * * *."

The Supreme Court, in Southland Gasoline Co. vs. Bayley, supra, in construing the above statutes as they relate to employees of private carriers (such as is defendant here), said:

"* * * Section 13 (b) (1) exempts from the maximum hour limitation of the Fair Labor Standards Act those employees over whom the Interstate Commerce Commission 'has power to' prescribe maximum hours of service. Section 204 (a) (3)* certainly gives 'power to' the Commission to establish maximum hours for the employees here involved. There is a limitation on the authority delegated, urged here by the employees as a condition precedent to the existence of the power. This is that the Commission may establish maximum hours only 'if need therefore is found.' Since the employees seek unpaid overtime compensation only for the period prior to a finding of need by the Commission, the employees argue that no 'power' existed in the Commission during the time for which compensation is claimed. We conclude to the contrary. The power to fix maximum hours has existed in the Commission since the enactment of the Motor Carrier Act in 1935. Before that power could be used, it was necessary to make a finding of need. Such necessity, however, did not affect the existence of the power. Legislation frequently delegates power subject to a finding of need or necessity for its exercise."

* Sec. 304 (a) (3), Title 49, U. S. C.

* * * * * *

"Not only does the language of section 13 (b) (1) indicate this Congressional purpose but what slight evidence there is from the legislative history points to the same conclusion. The amendment was adopted to free operators of motor vehicles from the regulation by two agencies of the hours of drivers."

[2] Walling vs. Jacksonville Paper Co., 128 Fed. (2) 395; 317 U. S. 561

[3] "Provided that the term 'goods' does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof, other than a producer, manufacturer, or processor thereof."

whether the goods were consumed by the crew in port, because Congress was undertaking to regulate only goods which were intended for resale or for processing or for manufacturing into other products.

54 This situation in reference to goods delivered to the ultimate consumer is entirely unlike the delivery of ice to refrigerating cars to accompany and preserve perishable products moving in interstate commerce as in Hamlet Ice Co. vs. Fleming, 127 Fed. (2) 165, and Atlantic Co. vs. Fleming, 129 Fed. (2) 87. The ice in each of those cases was an essential part of the process of shipping the fruit or vegetables. It accompanied the produce along its interstate journey. The ice companies sold same with knowledge that it was to be shipped in interstate commerce, as a *sine qua non* to interstate vegetable shipments. In Enterprise Box Co. vs. Fleming, 125 Fed. (2) 897, the federal regulations required cigars to be shipped in a container, which likewise accompanied the cigars in their interstate journey, and the cigar-box manufacturer knew that shipment and delivery in interstate commerce was not only intended but required.

But food for the crew of a vessel might be consumed in port. A member of the crew could eat and get shore leave, or desert the ship. He could subsist on food other than that sold by defendant. The food does not necessarily accompany the cargo, albeit the crew must eat on the voyage, but so must a flagman or conductor on an interstate train, yet it would hardly be seriously contended that the restauranteur who served the flagman a lunch en route, or the wife or boarding house keeper who prepared a lunch for him to take on his run, was engaged in interstate commerce.

Congress did not exercise the full extent of its power in dealing with the subject, but expressly excluded goods delivered to the ultimate consumer, other than a producer, manufacturer, or processor. The vessel was not a producer or manufacturer, and it is not believed that the term "processor" included the digestive processes of the crew.

55 Sec. 215 (a) (1) makes it unlawful "to transport, offer for transportation, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods" produced in violation of the Act. "Goods" after delivery to ultimate consumer are excluded, and hence not "in commerce." It, therefore, is not unlawful to ship, sell, or deliver goods to the ultimate consumer which are not intended for reselling or manufacturing or processing.

Nor do we agree with the legal conclusion of the lower Court that perishable fruits and vegetables may not come to rest merely

because they cannot be kept indefinitely. The lower Court found that:

"Because of their perishable nature, there is a very rapid turnover of the produce and goods handled by defendant. In general, goods received from out-of-state sources are unloaded, examined, sorted, repackaged, sold and delivered within one to five days after they are acquired by defendant."

They may not come to rest as long as an axe handle might on the shelf of a hardware merchant, but goods sold by the defendant locally have certainly come to the end of their interstate journey and have been placed in the store of the merchant along with goods locally acquired, and are, therefore, subject to the jurisdiction of the State. The term "coming to rest" must be considered in its relation to the commodity. The rest period of an axe handle could be far greater than the rest period of a tomato, and the perishable nature of the commodity alone would not place the vegetable merchant under the Act when the hardware merchant is not, merely because the axe handle could endure a longer period of repose than a tomato. Vegetables do not have to "come to rot" in order to "come to rest."

56 It is a matter of common knowledge that perishable fruits and vegetables cannot be "uncrated and examined," or "examined, sorted, repackaged, sold, and delivered" (quoting the language of the lower Court) on the run. The spoiled and rotten must be culled out. Buyers must be found willing to buy, and pay for, produce of the quality and price offered: That sold must be segregated and selected to fill the order. The produce must often be repackaged or crated and thereafter delivery must be made. These miscellaneous tasks are time consuming and are inconsistent with continuity of movement.

We do not hold, however, that commodities left unloaded in the refrigerated car and not placed in the store or warehouse have come to rest. Until and unless the goods are unloaded from the freight car and placed in the store or warehouse the interstate movement will not have ended.[4]

It appears that only five percent of the sales of the appellant are to interstate customers. It also appears that the appellant has ten to fifteen employees performing intra-and inter-state functions. If the functions in connection with sales of commodities to out-of-state customers were equally divided between ten employees then the interstate activity of each employee would touch only one-half of one percent of the business of appellant. If the five percent interstate business were equally handled by the fifteen employees, then the interstate activity of each employee

[4] Texas Company vs. Brown, 258 U. S. 477.

would affect only one-third of one percent of the business, as measured in money, and since the Court is not concerned with trifles its injunctive processes would hardly be called forth unless some of the employees have been engaged for a substantial portion of their time in these interstate activities.

Since manifestly some of the employees are engaged in interstate commerce the defendant should be required
57 to keep adequate records as to all of its employees as required by the Act and regulations promulgated thereunder.

The lower Court apparently determined that all of the employees of the defendant were covered under the Act, or, if it did not consider that all of defendant's employees were within the Act the injunctive order did not specify what employees, if any, were not covered. The Court below, by the width and indefiniteness of its injunction, committed an error similar to the one committed by the writer as District Judge in Fleming vs. Jacksonville Paper Company, 128 Fed. (2) 395.

The cause should be, and the same is hereby, reversed and remanded for further proceedings not inconsistent with the views herein expressed.

Reversed and remanded.

Dissenting opinion

HOLMES, Circuit Judge, dissenting:

The issues were heard by the court below on oral and documentary evidence. The court made its findings of fact and announced its conclusions of law; and, since the evidence was not brought up on appeal, it is on those findings and conclusions that the judgment appealed from must stand or fall.

The opinion says that the majority does not "agree with the legal conclusion of the lower court that perishable fruits and vegetables may not come to rest merely because they cannot be kept indefinitely." With deference, the district court did not so hold. It found as a fact that such was the rapidity of movement and the method of handling of goods purchased from outside the state that each such transaction was a continuous and unbroken shipment in
58 interstate commerce from without the state through appellant into the hands of its customers. Upon this finding of fact, the court held as a matter of law that all of appellant's employees were an integral part of that interstate movement and were therefore engaged in commerce under the Act. This ruling is not erroneous as a matter of law, and there is nothing in the record to show that it is untrue as a matter of fact.

The burden is on the appellant to show error in the judgment that it is asking this court to set aside. It has not met this

burden. We should apply here the reasoning of Higgins v. Carr Bros., 317 U. S. 572, in which there was a failure "to show an actual or practical continuity of movement of merchandise from without the state to respondents' regular customers within the state"; and wherein the Supreme Court held that there was nothing in the record to impeach the accuracy of the conclusion of the court below, saying: "Thus petitioner has not maintained the burden of showing error in the judgment which he asks us to set aside."

Since appellant has failed to show that this particular finding was clearly erroneous, and since by it every employee of appellant was brought within the coverage of the Act, I think the judgment appealed from should be affirmed.

59 In United States Circuit Court of Appeals

No. 10637

JAMES V. REUTER, INCORPORATED,

vs.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR

Judgment

July 22, 1943

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Louisiana, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court, that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court.

HOLMES, Circuit Judge, dissents.

60 [Clerk's certificate to foregoing transcript omitted in printing.]

61 Supreme Court of the United States

No. 436, October Term, 1943

[Title omitted.]

Order allowing certiorari

Filed November 22, 1943

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[File endorsement on cover:] File No. 47,929. U. S. Circuit Court of Appeals, Fifth Circuit. Term No. 436. L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, Petitioner *vs.* James V. Reuter, Inc. Petition for a writ of certiorari and exhibit thereto. Filed October 18, 1943. Term No. 436 O. T. 1943.

U. S. GOVERNMENT PRINTING OFFICE: 1943

No. 436

In the Supreme Court of the United States

OCTOBER TERM, 1943

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

JAMES V. REUTER, INC., RESPONDENT

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OCTOBER TERM, 1943

No. —

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

JAMES V. REUTER, INC., RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the Administrator of the Wage and Hour Division, requests that a writ of certiorari issue to review the decision of the United States Circuit Court of Appeals for the Fifth Circuit, entered July 22, 1943, reversing and remanding the decision of the United States District Court for the Eastern District of Louisiana.

OPINIONS BELOW

The findings of fact and conclusions of law of the District Court (R. 30–37) are reported in 49

F. Supp. 485. The opinion of the Circuit Court of Appeals (R. 47–52) is not yet officially reported, but is printed in 6 Wage Hour Rept. 743.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered July 22, 1943 (R. 53). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Does the definition of "goods" in Section 3 (i) of the Fair Labor Standards Act, which excludes from its scope "goods after their delivery into the actual physical possession of the ultimate consumer," exempt from the coverage of the Act the handling, packing, and hauling of produce prior to its delivery to ocean-going ships for consumption during voyages.

2. Was the Circuit Court of Appeals warranted in reversing the District Court's finding that there was a continuous movement in interstate commerce of out-of-State goods through defendant's place of business to its customers.

3. Are employees engaged in sorting, selecting, repackaging, and otherwise handling merchandise destined for interstate shipment engaged in the production of goods for commerce within the meaning of the definition of production in Section 3 (j) of the Act, which includes "handling

* * * or in any other manner working on such goods."

4. Where employees' activities relate indiscriminately to interstate and intrastate business, is it proper in determining whether they are entitled to the benefits of the Act, to measure the substantiality of each employee's interstate activities by dividing the proportion of the employer's business which is interstate by the total number of his employees.

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act are set forth in the Appendix.

STATEMENT

On January 23, 1942, the Administrator filed a complaint (R. 2–8) against James V. Reuter, Incorporated, alleging that the employer had failed to pay many of its employees engaged in interstate commerce in accordance with Sections 6 and 7 of the Fair Labor Standards Act and had otherwise violated the Act. Among other things, respondent's answer (R. 28–29) denied that it was engaged in interstate commerce.

The facts as found by the District Court may be summarized as follows:[1] Respondent, a

[1] The record on appeal did not include the transcript of the evidence. The findings of the trial court (R. 30–37), therefore, constitute the only factual evidence in the record.

Louisiana corporation, located in New Orleans, is engaged in handling and distributing at wholesale fresh vegetables and fruits (R. 30). Approximately 50 percent of the produce handled is purchased from out-of-State sources (R. 30). Because of the perishable nature of the goods and respondent's method of handling them, there is a continuity of movement of goods received from out-of-State sources until they reach respondent's customers (R. 35). In general, all goods received from out-of-State sources are received and distributed within a period of one to five days (R. 32). Sales are regularly made to out-of-State customers. For the four years from 1939 through 1942, direct out-of-State sales amounted to $58,278 and equalled 5.3 percent of total sales (R. 31).[2] Respondent also regularly sells and delivers "substantial amounts" of vegetables and produce to ship chandlers who provision boats for ocean-going voyages (R. 32). These goods are sold by respondent with the expectation that they will move outside the State (R. 32, 35).

[2] The proportion of direct out-of-State sales is shown in the following table (R. 31):

	Total	Out-of-State	Percent
1939	$201,829	$11,450	5.7
1940	198,994	15,885	8.0
1941	245,084	12,028	4.9
1942	448,758	18,915	4.2
Total (1939-42)	1,094,665	58,278	5.3

The amounts purchased are usually sufficient to last till the boats reach their next port of call (R. 32).

The produce purchased from other States is usually shipped by railroad (R. 30). The refrigerated cars carrying the goods are switched to a siding approximately one block from respondent's place of business known as the "Reuter Switch" (R. 30–31). All the vegetables and produce arriving from other States are unloaded from the freight cars and brought to respondent's place of business to be uncrated and examined before being sold (R. 31). Respondent's employees unload the produce from the freight cars and truck it to respondent's place of business, where its warehouse employees sort, select, repackage, and otherwise handle the goods without distinction as to their ultimate destinations (R. 31). An average of 12 orders a day are assembled and shipped to out-of-State customers usually by a Railway Express truck which is loaded at respondent's place of business by its employees (R. 31–32). The activities of the warehousemen thus related to the 50 percent of produce received from out-of-State sources, to the more than five percent which was shipped directly to out-of-State purchasers, and to the "substantial amounts" which were sold to ship chandlers. In addition, the warehousemen occasionally unloaded produce from freight cars. (R. 31, 32.)

The District Court held (1) that because of the rapidity in turnover of goods received from out-of-State sources and because of respondent's method of handling them, there was a continuity of movement of such goods from out-of-State to respondent's customers, whether local or distant; that the activities of all of respondent's employees were an integral part of that movement; and that therefore such employees were engaged in commerce within the meaning of the Act (R. 35); (2) that employees engaged in unloading, preparing, and shipping orders to out-of-State customers and to ship chandlers for provisioning of ocean-going vessels were engaged in commerce within the meaning of Sections 6 and 7 of the Act (R. 34); and (3) that employees who, without regard to the final destination thereof, sorted, picked over, packaged, repackaged, and otherwise handled produce, part of which was regularly shipped outside the State, "spent a substantial portion of their time working on such goods which did move outside the State" and were engaged in the production of goods for commerce within the meaning of Section 3 (j) of the Act (R. 34–35). An injunction was issued restraining further violations of the minimum wage, overtime, and record-keeping provisions of the Act (R. 32–33, 36–37).

On appeal, the Circuit Court of Appeals reversed and remanded the case on the grounds (1) that the lower court was in error in ruling that the produce had not come to rest at respondent's premises; (2) that the delivery of goods to ship chandlers or ships for consumption on interstate or foreign journeys was to the "ultimate consumer," and that therefore the preparation, handling, and delivery of such goods were excluded from the Act by Section 3 (i); (3) that interstate sales to the extent of five percent would not suffice to establish coverage in the absence of additional proof that particular employees spent a substantial portion of their time working on these interstate shipments, because if this five percent were equally divided among all employees the fractional percentage of the employer's business performed by each employee would be too trifling to justify injunctive relief; and (4) that the lower court erred in holding that the sorting, repackaging, and handling of goods constituted production of goods for commerce under the Act (R. 47–52).

Judge Holmes dissented on the ground that there was nothing in the record to impugn the lower court's finding "that such was the rapidity of movement and the method of handling of goods purchased from outside the state that each such transaction was a continuous and unbroken ship-

ment in interstate commerce from without the state through appellant into the hands of its customers," and that, upon this finding, the court correctly ruled "that all of appellant's employees were an integral part of that interstate movement and were therefore engaged in commerce under the Act" (R. 52).

REASONS FOR GRANTING THE WRIT

There are four independent grounds upon which this petition for a writ of certiorari is premised:

1. The court below held that the delivery of produce to a ship destined for interstate journeys was to the "ultimate consumer," and, therefore, the packing, hauling, and delivery of such produce were excluded from the Act by the definition of "goods" contained in Section 3 (i). This interpretation is contrary to the literal language of the section and is in conflict with decisions of other circuits as well as with another decision of the Fifth Circuit itself. *Hamlet Ice Co.* v. *Fleming*, 127 F. (2d) 165 (C. C. A. 4), certiorari denied, 317 U. S. 634; *Chapman* v. *Home Ice Co.*, 136 F. (2d) 353 (C. C. A. 6); *Atlantic Co.* v. *Walling*, 131 F. (2d) 518 (C. C. A. 5).[3] The definition of the term "goods" in Section 3 (i) contains the proviso that it "does not include

[3] These decisions involved the production and delivery of ice to be used on railroad trains during the course of transportation.

goods *after* their delivery into the actual physical possession of the ultimate consumer other than a producer, manufacturer, or processor thereof." (Italics supplied.) Claim to the "ultimate consumer" exemption was rejected in all three decisions cited above on the ground that the exclusionary clause in Section 3 (i) does not apply to the production or the handling of goods prior to their delivery to the ultimate consumer. As stated by the Sixth Circuit, "the exclusion clause in Section 3 (i) is intended to apply to goods which have come into the hands of the ultimate consumer *after* transportation is ended, and after they have been withdrawn from further traffic or sale;" it "exempts the ultimate consumer from the penalty of Section 15 (a) (1), and has no effect in limiting the scope of the Act as to the producers of goods intended for shipment in interstate commerce" (*Chapman* v. *Home Ice Co.*, 136 F. (2d) at 355).

Applying these decisions to the instant case, the exclusion clause might protect the ship owners from the prohibition against transporting "hot goods" (Section 15 (a) (1)), but the exemption does not apply to the producer of the merchandise or the wholesaler handling the goods prior to their delivery to the ships.*

* Thus it seems clear that the decision below is erroneous even if it be assumed that the delivery of produce to ships constitute delivery to the "ultimate consumer," which is by no means clear.

2. The reversal of the District Court's ruling that the commodities purchased out-of-State continued in interstate commerce until they reached respondent's customers involves an interpretation of the Act which we believe is contrary to this Court's decisions in *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564 and *Higgins* v. *Carr Bros. Co.*, 317 U. S. 572. As Judge Holmes pointed out in his dissent, the District Court "found as a fact that such was the rapidity of movement and the method of handling of goods purchased from outside the state that each such transaction was a continuous and unbroken shipment in interstate commerce from without the state through appellant into the hands of its customers. * * * there is nothing in the record to show that it [this ruling] is untrue as a matter of fact" (R. 52).

The record on appeal contained only the pleadings and the findings and conclusions of the District Court. Respondent, who was the appellant below, did not designate or transmit any portion of the evidence. In *Higgins* v. *Carr Bros. Co.*, which involved a wholesale fruit, produce and grocery business, the decision was affirmed by this Court because there was nothing in the record to support petitioner's claim of "an actual or practical continuity of movement of merchandise from without the state to respondent's regular cus-

tomers within the state," and petitioner had not maintained the burden of showing error in the judgment below. Here, there is nothing in the record to impeach the accuracy of the District Court's finding that there was an actual continuity of movement in this case. The importance of the factual determination of continuity of movement, which this Court stressed in *Higgins* v. *Carr Bros. Co.*, has been disregarded by the court below. See also *Walling* v. *American Stores Co.*, 133 F. (2) 840 (C. C. A. 3) and *Walling* v. *A. H. Phillips, Inc.*, 6 Wage Hour Rept. 699 (D. Mass.) in which the courts, relying upon the *Jacksonville* and *Higgins* decisions, stressed the physical continuity of movement in finding that the interstate journey continued through the warehouse to the local retail stores.

3. The court below held, without discussion of the question, that the sorting, handling, and packaging of goods which are shipped in interstate commerce do not constitute production for commerce within the meaning of the Act. We believe this holding disregards the terms as well as the policy of the Act. It also conflicts with the decision of the Fourth Circuit in *Bracey* v. *Luray*, decided September 16, 1943, 6 Wage Hour Rept. 938. Section 3 (j) provides that "for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such em-

ployee was employed in producing, manufacturing, mining, *handling*, transporting, *or in any other manner working on such goods.*" [Italics supplied.] The activities of employees preparing goods for shipment to customers are clearly "handling" and "working on" goods within the statutory language. In *Bracey* v. *Luray, supra*, the court held that the handling of scrap iron which was subsequently sold to shipbuilders constituted production since "'handling' is by express terms included in 'production.'" See also *Fleming* v. *Kenton Loose Leaf Tobacco Warehouse Co.*, 41 F. Supp. 225 (E. D. Ky.), where the court held (pp. 256–257):

> A warehouse is not a producer in the ordinary sense of the word. * * * It is, however, a handler of a product moving in interstate commerce and thereby comes squarely within the definition of "producer" as defined by Section 3 (j).

The view that activities of this character come within the statutory definition of production not only follows the language of the statute, but also carries out the purpose of the Act (Section 2 (a)) to prevent interstate commerce from being employed as "the instrument of competition in the distribution of goods produced under substandard labor conditions." See *United States* v. *Darby*, 312 U. S. 100, 115. Low wages paid for sorting,

packaging, or otherwise handling goods affect the cost of products shipped in interstate commerce, and obviously have the same competitive effect, as low wages paid for the processing or manufacturing of goods.

4. The ruling of the court below on the method of determining whether a substantial amount of an employee's time is spent on interstate business is plainly erroneous and would result in an unwarranted exclusion of numerous employees from the benefits of the Act. The District Court found that, in addition to "substantial amounts" of goods sold to ship chandlers for shipment outside the State, five percent of respondent's sales were to interstate customers (R. 31–32). Respondent's employees worked on all goods indiscriminately without distinction as to their ultimate destination (R. 31). The court below held that, if the functions in connection with interstate sales were equally handled by all the 10–15 employees, the interstate activity of each employee would affect only one-half to one-third of one percent of respondent's business, and "since the Court is not concerned with trifles its injunctive processes would hardly be called forth" (R. 51). The patent fallacy of this reasoning is demonstrated by its application to an employer doing 100 percent interstate business with 1,000 em-

ployees. According to Circuit Judge Waller's reasoning, the interstate activities of each employee would relate to only one-tenth of one percent of the employer's interstate business, and no employee would be subject to the Act. Determination of the applicability of the Act upon the basis of any such calculations would produce a startling result in obvious conflict with its meaning and purpose. The approach of the court below is erroneous also because it stresses the amount of the employer's interstate business "as measured in money," as distinguished from the amount of the employee's time spent in these activities. This conflicts with the rule announced by this Court in *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, 572 and *Kirschbaum Co.* v. *Walling*, 316 U. S. 517, and applied by other circuit courts in *Walling* v. *Peoples Packing Co.*, 132 F. (2d) 236 (C. C. A. 10) and *Davis* v. *Goodman Lumber Co.*, 133 F. (2d) 52 (C. C. A. 4).

In the case of most wholesalers distributing some of their merchandise in interstate commerce, as in the case of "most manufacturing businesses shipping their product in interstate commerce" (cf. *United States* v. *Darby*, 312 U. S. 100, 117–118), employees' activities relate indiscriminately to both interstate and intrastate commerce. This Court, in the *Darby* case, recognized that "it

would be practically impossible, without disrupting manufacturing businesses, to restrict the prohibited kind of production to the particular pieces" of goods which later move in interstate commerce where the product is produced "without reference to its ultimate destination," 312 U. S. at 117–118. It is our position in such cases, except where the employer's interstate business is trifling in amount and irregular, that employees working indiscriminately in connection with the interstate and intrastate business are entitled to the benefits of the Act. In the recent decision of the Fourth Circuit in *Guess* v. *Montague*, decided September 16, 1943, 6 Wage Hour Rept. 934, the court held that where interstate and intrastate activities were commingled, employees "have made a prima facie showing entitling them to the protection of the Act * * * by showing the general nature of defendant's business" and that "it is not unreasonable to place [upon the employer] the burden" of producing evidence that certain employees "did not render any service in connection with its interstate business" (p. 935). We believe that this is the practical approach suggested by the decision in the *Darby* case.

CONCLUSION

Each of the above questions is concerned with the test to be applied in determining coverage

under the Fair Labor Standards Act,[5] and is accordingly of general consequence to numbers of employers and employees.[5] The decision below on each question is both clearly erroneous and in conflict with principles approved by other courts. We respectfully request, therefore, that this petition for a writ of certiorari be granted.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

DOUGLAS B. MAGGS,
Solicitor,
United States Department of Labor.

OCTOBER 1943.

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[5] Cf. *Overstreet* v. *North Shore Corporation*, 318 U. S. 125, 127; *McLeod* v. *Threlkeld*, No. 787, 1942 Term, decided June 7, 1943.

APPENDIX

Fair Labor Standards Act, 52 Stat. 1060 (29 U. S. C., sec. 201, et seq.).

SEC. 3 (i). "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

SEC. 3 (j). "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.

U. S. GOVERNMENT PRINTING OFFICE: 1943

FILE COPY

No. 436

In the Supreme Court of the United States

OCTOBER TERM, 1943

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The District Court's findings of fact and conclusions of law (R. 18–23) are reported in 49 F. Supp. 485. The opinion of the Circuit Court of Appeals (R. 27–34) is reported in 137 F. (2d) 315.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on July 22, 1943 (R. 34). The petition for writ of certiorari was granted on November 22, 1943. The jurisdiction of this Court rests

on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Does the definition of "goods" in Section 3 (i) of the Fair Labor Standards Act, which excludes from its scope "goods after their delivery into the actual physical possession of the ultimate consumer" exempt from the coverage of the Act the handling, packing, and hauling of produce sold by respondent to ship chandlers for delivery to ocean-going ships for consumption during voyages?

2. Are employees of a wholesaler engaged in sorting, selecting, repackaging, and otherwise handling merchandise destined for interstate shipment engaged in the production of goods for commerce within the meaning of the definition of production in Section 3 (j) of the Act, which includes "handling * * * or in any other manner working on such goods"?

3. Was the Circuit Court of Appeals warranted in reversing the District Court's ruling that there was a continuous movement in interstate commerce of out-of-State goods through respondent's place of business to its customers?

4. Where employees' activities relate indiscriminately to interstate and intrastate business, in the absence of proof of the time spent by individual employees in covered work, is it proper in determining whether they are entitled to the bene-

fits of the Act, to measure the substantiality of each employee's interstate activities by dividing the proportion of the employer's business which is interstate by the total number of his employees?

STATUTE INVOLVED

The provisions of the Fair Labor Standards Act[1] primarily involved are:

> SEC. 3 (i). "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.
>
> SEC. 3 (j). "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.

[1] Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, 29 U. S. C., Sec. 201.

The other relevant provisions of the Act are printed in the Appendix, *infra*, pp. 40–42.

STATEMENT

On January 23, 1942, the Administrator filed a complaint (R. 1–5) against James V. Reuter, Incorporated, alleging that it had failed to pay many of its employees engaged in interstate commerce in accordance with Sections 6 and 7 of the Fair Labor Standards Act and had otherwise violated the Act. Among other things, respondent's answer (R. 17–18) denied that it was engaged in interstate commerce.

The facts as found by the District Court may be summarized as follows:[2] Respondent, a Louisiana corporation, located in New Orleans, is engaged in handling and distributing at wholesale fresh vegetables and fruits (R. 18). It employs 10 to 15 employees, including office help, warehousemen, truck drivers and laborers (R. 18). Approximately 50 percent of the produce handled by respondent is purchased from out-of-State sources (R. 18). Sales are regularly made to out-of-State customers. For the four years from 1939 through 1942, direct out-of-State sales amounted to $58,278 and equalled 5.3 percent of total sales (R. 19). Respondent also regularly sells and delivers "substantial amounts" of veg-

[2] The record on appeal did not include the transcript of the evidence. The findings of the trial court (R. 18–21), therefore, constitute the only factual evidence in the record.

etables and produce to ship chandlers who provision boats for ocean-going voyages (R. 19). These goods, which sometimes are delivered by respondent's employees to the docks, or unloaded on runners, winches or the boats themselves (R. 19–20), are sold by respondent with "every reason to expect" that they will move outside the State (R. 20, 21). The amounts purchased are usually sufficient to last till the boats reach their next port of call (R. 19). Because of their perishable nature, there is a very rapid turnover of the produce and goods handled by respondent (R. 20). In general, all goods from out-of-State sources are received and distributed within a period of one to five days (R. 20).

The produce purchased from other States is usually shipped to respondent by rail in refrigerated freight cars (R. 18). These cars are switched to a siding known as the "Reuter Switch," which is approximately one block from respondent's place of business (R. 18–19). The produce is there unloaded from the cars by respondent's employees and trucked by them to respondent's place of business to be uncrated and examined before being sold (R. 19). At the warehouse respondent's employees sort, select, repackage, and otherwise handle the produce without distinction as to its ultimate destination (R. 19). In addition to shipments to other wholesalers and retailers in Louisiana, each day 12

orders on an average are shipped to out-of-State customers. Usually, respondent's employees load these orders on a Railway Express truck which stops each day at respondent's place of business (R. 19). Produce remaining on hand at the end of the day is temporarily stored overnight in the refrigerated freight cars, yet so rapid is the movement of the produce that the freight cars are "always fully unloaded and released within two to five days after arrival" (R. 20).

The District Court held (1) that employees engaged in unloading produce coming from out-of-State sources and employees engaged in preparing and shipping orders to out-of-State customers and to ship chandlers for provisioning oceangoing vessels were engaged in commerce within the meaning of Sections 6 and 7 of the Act (R. 21); (2) that employees who, without regard to the final destination thereof, sorted, picked over, packaged, repackaged, and otherwise handled produce, part of which was regularly shipped outside the State, "spent a substantial portion of their time working on such goods which did move outside the State" and were engaged in the production of goods for commerce within the meaning of Section 3 (j) of the Act (R. 21); and (3) that because of the rapidity in turn-over of goods received from out-of-State sources and because of respondent's method of handling them, "there was a continuity of movement of such goods" from out-of-State to re-

spondent's customers, whether local or distant; that the activities of all of respondent's employees were "an integral part of that movement"; and that therefore such employees were engaged in commerce within the meaning of the Act (R. 21–22). An injunction was issued restraining further violations of the minimum wage, overtime, and record-keeping provisions of the Act (R. 23–24).

On appeal, the Circuit Court of Appeals reversed and remanded the case on the grounds (1) that the delivery of goods to ships for consumption on interstate or foreign journeys was to the "ultimate consumer," and that therefore the preparation, handling, and delivery of such goods sold by respondent to ship chandlers were excluded from the Act by Section 3 (i) (R. 30–31); (2) that the lower court erred in holding that the sorting, repackaging, and handling of goods constituted production of goods under the Act (R. 30); (3) that the lower court was in error in failing to rule that the produce had come to rest and that the interstate movement ended at respondent's premises (R. 31–32); and (4) that interstate sales to the extent of 5 percent would not suffice to establish coverage in the absence of additional proof that particular employees spent a substantial portion of their time working on these interstate shipments, because if this 5 percent were equally divided among all employees the fractional percentage of the employer's busi-

ness performed by each employee would be too trifling to justify injunctive relief (R. 32–33).[3]

Judge Holmes dissented on the ground that there was nothing in the record to impugn the lower court's ruling (which he termed a finding of fact) "that such was the rapidity of movement and the method of handling of goods purchased from outside the State that each such transaction was a continuous and unbroken shipment in interstate commerce from without the state through appellant into the hands of its customers", and that, upon this finding, the court correctly held "that all of appellant's employees were an integral part of that interstate movement and were therefore engaged in commerce under the Act" (R. 33–34).

SPECIFICATION OF ERRORS.

Each of the errors set forth in the petition for writ of certiorari will be urged:

1. The court erred in ruling that Section 3 (i) of the Act excludes from the Act the preparation, handling, and delivery of goods to ship chandlers or ships for consumption on interstate or foreign journeys.

2. The court erred in ruling that the sorting, repackaging, and handling of goods does not

[3] The Court of Appeals conceded that "truck drivers and their helpers when engaged in unloading produce from freight cars coming from out of the State and when engaged for a substantial part of their time in hauling such produce from freight cars to defendant's place of business" are covered by the Act (R. 29).

constitute production of goods for commerce within the meaning of the Act.

3. The court erred in reversing the District Court's ruling that the goods received by respondent from out-of-State sources do not come to rest and end their interstate journey at respondent's premises, but that, because of the rapidity of movement, and because of respondent's method of handling the goods, there is a continuity of movement from the out-of-State sources to respondent's customers.

4. The court below erred in ruling that sales admittedly interstate, comprising 5 percent of respondent's total sales, would not suffice to establish coverage in the absence of additional proof that particular employees spend a substantial portion of their time working on such interstate sales.

SUMMARY OF ARGUMENT

I

The Court of Appeals erred in ruling that the exception in Section 3 (i) warranted disregard of respondent's sales to ship chandlers in the determination of coverage. Section 3 (i) provides that the term "goods" does not include goods *after* their delivery to the ultimate consumer; this does not exclude goods prior to their delivery to the consumer while they are being handled by respondent's employees.

II

The Court of Appeals erred in ruling that the sorting, handling, and packaging of goods to be shipped in interstate commerce does not constitute "production of goods" for commerce within the meaning of the Act. Section 3 (j) defines "production of goods" to include "handling, * * * or in any other manner working on such goods". Respondent's employees, in sorting, selecting, packaging, and handling produce, were certainly "handling" and otherwise "working on such goods."

III

In reversing the District Court's ruling that the goods received from out-of-State sources continued their interstate movement through respondent's premises to respondent's customers, the Court of Appeals misapplied, we believe, this Court's decisions in *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, and *Higgins* v. *Carr Bros. Co.*, 317 U. S. 572. As Judge Holmes pointed out in his dissent below, the District Court's decision constituted in reality a finding of fact "that such was the rapidity of movement and the method of handling of goods purchased from outside the state that each such transaction was a continuous and unbroken shipment in interstate commerce from without the state through appellant [respondent] into the hands of its customers." "There is nothing in the record to show that it [this finding] is untrue

as a matter of fact." (*Ibid.*) Commerce is not a technical legal conception, but a practical one, drawn from the course of business. The facts in the record with respect to the rapidity of movement of the produce and respondent's method of handling the merchandise affirmatively support the District Court's conclusion. Just as the petitioner in *Higgins* v. *Carr Bros. Co.*, 317 U. S. 572, failed to maintain the burden of showing error in the conclusion of the lower court that there was no continuity of interstate movement there, so the respondent in this case has failed to show error in the trial court's judgment that there *was* actual continuity of interstate movement here.

IV

The formula applied by the Court of Appeals, whereby it concluded that although 5 percent of respondent's sales were admittedly in interstate commerce, each individual employee's interstate activity would be too trifling to invoke the court's injunctive processes, is plainly fallacious and would result in the unwarranted exclusion of numerous employees from the benefits of the Act.

Likewise untenable is the ruling of the Court of Appeals that the application of the Act should be conditioned upon specific proof that particular employees spent a substantial portion of their time in the interstate activities. Not only is this unworkable, but it is subversive of the purposes of the Act. *United States* v. *New York Cent.*

R. R., 272 U. S. 457, 464; *United States* v. *Darby*, 312 U. S. 100, 117–118. The only practical method for determining the applicability of the Act to employees whose interstate and intrastate duties are commingled is the method outlined by the Fourth Circuit in the case of *Guess* v. *Montague*, 6 Wage Hour Rept. 934, where it was held that a prima facie showing of coverage of employees is made when it appears that the employees worked on interstate as well as intrastate business and that the two classes of business were commingled in the employer's operations; that the burden is then upon the employer to produce evidence that particular employees "did not render any service in connection with its interstate business" (at p. 935).

ARGUMENT

The District Court relied upon three independent grounds of coverage, each of which taken separately, the Government contends, is sufficient to support the conclusion that a substantial amount of the employees' time was devoted to interstate activities within the coverage of the Act. The three grounds of coverage relied upon were as follows: (1) the unloading of interstate shipments and the preparation of goods for interstate shipments constitute interstate commerce; (2) the preparation (including sorting, selecting, handling, packaging, and repackaging) of goods, a substantial part of which are regularly shipped

outside the State in the ordinary course of business, also constitutes "production" of goods for commerce within the Act; and (3) because of the rapidity of movement of the extrastate goods through respondent's place of business to its customers and because of respondent's method of handling such goods, the interstate commerce was continuous from the out-of-State sources until the goods reached respondent's customers, whether local or distant.

The Court of Appeals rejected the second and third grounds of coverage, and ruled that none could be predicated upon the preparation and delivery of goods to ships or ship chandlers, because of the definition of "goods" in Section 3 (i). Application of the first ground of coverage, according to the Court of Appeals, was dependent upon proof that particular employees spent a substantial portion of their time in the covered activities.

I

THE ACT IS APPLICABLE TO EMPLOYEES ENGAGED IN THE PREPARATION, HANDLING AND DELIVERING OF PRODUCE TO SHIP CHANDLERS FOR CONSUMPTION ON OCEAN-GOING VESSELS NOTWITHSTANDING THE EXCLUSIONARY CLAUSE IN SECTION 3 (i)

The District Court found that respondent sells substantial amounts of produce to ship chandlers for provisioning ocean-going vessels moving outside of the State of Louisiana. Various of respondent's employees are engaged in preparing

this produce, handling the orders, and sometimes transporting the produce to the loading docks or on board the ships in the New Orleans harbor. The District Court concluded that employees performing these activities were covered by the Act (R. 21). Although there are somewhat casual remarks in the majority opinion which suggest the contrary,[4] it seems unlikely that the circuit court of appeals seriously questioned the interstate character of these transactions. Certainly it is too late to deny that the business of selling merchandise within a State for transportation beyond the State is interstate commerce. – *Currin* v. *Wallace*, 306 U. S. 1, 10; *Hamlet Ice Co.* v. *Fleming*, 127 F. (2d) 165 (C. C. A. 4), certiorari denied, 317 U. S. 634;[5] *Atlantic Co.* v. *Walling*, 131 F.

[4] The court noted, for example, that provisions for the vessel "might be consumed in port" since a "member of the crew could eat and get shore leave, or desert the ship" or "could subsist on food other than that sold by defendant" (R. 31).

[5] In the *Hamlet Ice* case the Circuit Court of Appeals for the Fourth Circuit narrowly circumscribed the force of its earlier decision in *Winslow* v. *Federal Trade Comm.*, 277 Fed. 206, certiorari denied, 258 U. S. 618, which had reached a contrary result with reference to sales to ship chandlers. The court indicated that the *Winslow* case was not applicable to questions as to the scope and application of the Fair Labor Standards Act. In the *Hamlet Ice* case, it was held that employees supplying ice within a State for refrigerating railroad cars in which perishable produce was transported outside of the State were entitled to the benefits of the Act. Pointing out that there the movement of the ice was a "*sine qua non*" to the movement of the produce, the court below held that the decision was inapplicable to a movement

(2d) 518 (C. C. A. 5). The interstate character of these activities is equally apparent if respondent's employees are regarded as engaged in producing goods for commerce. *Warren-Bradshaw Drilling Co.* v. *Hall*, 317 U. S. 88; *Enterprise Box Co.* v. *Walling*, 125 F. 2d) 897 (C. C. A. 5), certiorari denied, 316 U. S. 704; *Atlantic Co.* v. *Walling*, 131 F. (2d) 518 (C. C. A. 5).[6]

The circuit court of appeals held that respondent's sales to the ship chandlers should be disregarded in determining the coverage of the Act because of the exclusionary language in Section 3 (i), which provides that the term "goods" "does not include goods *after* their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof". [Italics supplied.] Regarding the vessels and their crews as the ultimate consumers of the produce, the court seemingly held that respondent's employees were not handling "goods" for commerce within the meaning of the Act.[7]

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of produce not shown to be indispensable to the movement of the vessels in their ocean voyages (R. 31). This novel suggestion is supported neither by the language of the Act nor by the decisions of this Court.

[6] This question is more fully discussed in point II, *infra*.

[7] Employees may be engaged "in commerce" under the Act without handling or working on "goods." See the definition of "commerce" in Section 3 (b). The word "goods" is not used in defining the applicability of Sections 6 and 7 to employees so engaged "in commerce." For these reasons, it

This reading of Section 3 (i) has been rejected by every circuit court of appeals which has ruled on the matter, including the Fifth Circuit in two earlier cases. *Enterprise Box Co.* v. *Walling,* 125 F. (2d) 897 (C. C. A. 5), certiorari denied, 316 U. S. 704; *Atlantic Co.* v. *Walling,* 131 F. (2d) 518 (C. C. A. 5); *Hamlet Ice Co.* v. *Fleming,* 127 F. (2d) 165 (C. C. A. 4), certiorari denied, 317 U. S. 634; *Chapman* v. *Home Ice Co.,* 136 F. (2d) 353 (C. C. A. 6), certiorari denied, No. 307, this Term, 64 S. Ct. 72. Uniformly, it has been recognized, as the language of the statute requires, that the exclusionary clause applies only "after" goods are delivered to the ultimate consumer, at which point it operates to exempt the ultimate consumer from possible liability under Section 15 (a) (1) for transporting so-called "hot goods." If the ships provisioned with respondent's produce are the ultimate consumers thereof, the produce nevertheless constituted "goods" within the meaning of the Act until it was delivered to the ships. Because of Section 3 (i), the produce may *then* have ceased to be "goods"; this does not mean that it was not "goods" when respondent handled it and sold it to the ship chandlers. As the Circuit Court of Appeals for the Sixth Circuit pointed out in

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would seem that the interpretation and application of Section 3 (i) made by the circuit court of appeals can be predicated only upon the assumption that the activities in question constitute "production of goods for commerce" as distinguished from activities "in commerce."

Chapman v. *Home Ice Co., supra,* at 355, the clause "exempts the ultimate consumer from the penalty of section 15 (a) (1), and has no effect in limiting the scope of the Act as to the producers of goods intended for shipment in interstate commerce".

II

EMPLOYEES OF A WHOLESALER WHO SORT, HANDLE, PACKAGE, AND DELIVER GOODS FOR SHIPMENT BEYOND THE STATE ARE ENGAGED IN THE PRODUCTION OF GOODS FOR COMMERCE WITHIN THE MEANING OF THE ACT

Section 3 (j) of the Act provides that "for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, *handling,* transporting, *or in any other manner working on such goods,* or in any process or occupation necessary to the production thereof, in any State". [Italics supplied.] The activities of respondent's employees in preparing goods for shipment to customers clearly constitute "handling" and "working on" goods within the plain meaning of those terms. The Court of Appeals, without giving its reasons, stated that it disagreed with the conclusion of the lower court that the employees were engaged in production of goods for commerce. Apparently, the Court of Appeals felt that the ordinary meaning of the word "production" would not include handling in the course of wholesale

distribution. But, whatever the normal connotation of the word "production," its meaning in the Act is controlled by the statutory definition which Congress supplied in Section 3 (j). There might be force in the position of the Court of Appeals, as this Court pointed out in the case of *Fox* v. *Standard Oil Co.*, 294 U. S. 87, "if the statute had left the meaning of its terms to the test of popular understanding. Instead, it has attempted to secure precision and certainty * * * supplying its own glossary. * * * In such circumstances definition by the average man or even by the ordinary dictionary * * * is not a substitute for the definition set before us by the lawmakers * * *" (at pp. 95, 96).

The decisions interpreting the Act have uniformly recognized that the statutory definition of "production" goes beyond the ordinary sense of the word and includes handling and working on goods apart from the manufacturing processes. The Fourth Circuit, in the case of *Bracey* v. *Luray*, 138 F. (2d) 8 (C. C. A. 4), where employees were engaged in the sorting, cutting, and loading of scrap iron, activities comparable to the handling of the produce by employees in the instant case, held that such handling of scrap iron constituted "production" within the meaning of the Act since " 'handling' is by express terms included in 'production' " (at p. 11). Similarly, in *Fleming* v. *Kenton Loose Leaf Tobacco Ware-*

house Co., 41 F. Supp. 255 (E. D. Ky.),[8] the court held (pp. 256–257):

> A warehouse is not a producer in the ordinary sense of the word.
>
> * * * * *
>
> It is, however, a handler of a product moving in interstate commerce and thereby comes squarely within the definitions of "producer" as defined by Section 3(j).

See also *Philips* v. *Star Overall Dry Cleaning Co.*, 7 Wage Hour Rept. 92 (S. D. N. Y., 1944). The same conclusion was reached in applying the statutory definition to the child labor provisions of the Act in the recent case of *Lenroot* v. *Western Union Tel Co.*, 32 F. Supp. 142, 149 S. D. N. Y.).

As noted above, the Court of Appeals suggested no reason at all for departing from the plain language of the statutory definition. Respondent argued in its brief in opposition to the petition for certiorari that the words "handling or in any other manner working on" refer only to "such handling as is necessary to the production of goods for commerce" (br. in opp. to pet., p. 10), apparently using the word "production" in the sense of strictly manufacturing processes. This argument obviously reads the words "handling," etc. out of the statute. There is nothing in the statutory language or purpose to indicate that the word "handling" is subordinate to or

[8] In this case the tobacco warehouse employees weighed the tobacco and placed it in baskets according to grade.

qualified by the words "manufacturing" or "mining"; all three words have equal stature in the definition.

Respondent also suggests that the handling and transportation of goods cannot constitute production, since if this is so activities constituting interstate commerce would also constitute production of goods for commerce (*id.*, at 9). But no reason appears why an activity may not come within both categories of coverage. On the face of the statute, it is apparent that the definition of these terms are not mutually exclusive; it is to be expected that the terms will frequently overlap. Nothing in the legislative history or in the Congressional purpose warrants the restrictive interpretation of the broad definitional language which the Court of Appeals adopted.

The view that activities of this character come within the statutory definition of production not only follows the language of the statute, but also carries out the purpose of the Act (Section 2 (a)) to prevent interstate commerce from being employed as "the instrument of competition in the distribution of goods produced under substandard labor conditions". See *United States* v. *Darby*, 312 U. S. 100, 115. Low wages paid for sorting, packaging, or otherwise handling goods affect the cost of products shipped in interstate commerce, and obviously have the same competitive effect as low wages paid for the processing or manufacturing of goods. Thus, substandard labor

conditions can be as effectively spread and perpetuated among the workers of the several States by underpayment of workers engaged in handling goods as by underpayment of workers engaged in the strictly manufacturing processes. (See Section 2 (a) (1).)

We submit, therefore, that the Court of Appeals erred when it rejected the District Court's ruling that employees of respondent who sorted, picked over, handled, packaged and repackaged produce were engaged in the production of goods for commerce (R. 21). The produce handled included not only produce sold and directly shipped by respondent to out-of-State customers (an average of 5.3 percent for the four years 1939–1942 inclusive, ranging from 4.2 percent in 1942 to 8.0 percent in 1940 (R. 19)), but also the "substantial amounts" bought from respondent by ship chandlers for the avowed purpose of provisioning vessels for ocean-going voyages (R. 19 and 21). Respondent's employees handled all the produce indiscriminately, "without regard to the final destination thereof" (R. 21). Whether or not they were engaged "in commerce" (see points I and III), they were nevertheless covered by the Act because they were "engaged in the production of goods for commerce." The part of their activities which related to goods destined for movement in interstate commerce was obviously a "substantial part" thereof; hence the fact that they also

"produced" goods for intrastate commerce does not defeat coverage (see Point IV, *infra*).

III

THE CIRCUIT COURT OF APPEALS ERRED IN REVERSING THE DISTRICT COURT'S RULING THAT THERE WAS A CONTINUOUS MOVEMENT IN INTERSTATE COMMERCE OF OUT-OF-STATE GOODS THROUGH RESPONDENT'S PLACE OF BUSINESS TO ITS CUSTOMERS

As an additional and separate ground for holding respondent's employees to be engaged "in commerce" and therefore subject to the Act, even if none of the produce had been sold by respondent for shipment out of the State, the District Court held that because of the rapidity of movement of the merchandise received from out of the State and because of respondent's method of handling it, there was a continuity of movement of such goods through respondent's premises to its customers (R. 21). This ruling was based upon the following facts:[9] Respondent's out-of-State purchases of fruits and vegetables are shipped in refrigerated freight cars which are shunted to respondent's siding (R. 18–19). From here, that part of the produce which is immediately unloaded is brought to respondent's premises, one block away, where it is examined, sorted,

[9] The record on appeal contained only the pleadings and the findings and conclusions of the District Court. Respondent, who was the appellant below, did not designate or transmit any portion of the evidence. Thus the factual evidence in the record consists solely of the findings of the District Court.

selected, packaged, and handled, without distinction as to its ultimate destination (R. 19). The bulk of the produce is then rapidly sold and delivered to respondent's customers, who comprise both local and out-of-State wholesalers and retailers, as well as ship chandlers (R. 19–20). The refrigerated freight cars in which goods are received are used as a temporary overnight storage place for produce not sold at the end of the first day (R. 20). The freight cars are always fully unloaded and released within two to five days after arrival (R. 20). In general, all goods received from out-of-State sources are unloaded and pass through respondent's premises on to the customers within one to five days after receipt by respondent (R. 20).

The Court of Appeals reversed this ruling of the District Court on the ground that the merchandise necessarily came to rest at respondent's place of business because the produce could not be examined, sorted, etc., "on the run" and "buyers must be found willing to buy", and "these miscellaneous tasks are time consuming and are inconsistent with the continuity of movement" (R. 32). We submit that the Court of Appeals, in so ruling, failed to give effect to the practical principles laid down in this Court's decision in *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, and *Higgins* v. *Carr Bros. Co.*, 317 U. S. 572.

The *Jacksonville Paper Company* case involved

the applicability of the Fair Labor Standards Act to branch houses, of a wholesaler of paper products and related articles, which, though constantly receiving merchandise on interstate shipments and distributing it to their customers, did not ship or deliver any of it across state lines.[10] The District Court held that none of the employees in these branch houses was subject to the Act. The Court of Appeals reversed, holding that where goods procured from out of the State to fill a customer's order are shipped interstate with intent that they be, and they are, carried at once to that customer, the whole movement is interstate.[11] This Court, in response to the Administrator's contention that under the decision below any pause at the warehouse was sufficient to end the interstate journey, said: "a break in [the] physical continuity of transit is not controlling" (317 U. S., at 569), and "The entry of the goods into the warehouse interrupts but does not necessarily terminate their interstate journey. A temporary pause in their transit does not mean that they are no longer 'in commerce' within the meaning of the Act" (317 U. S., at 568).

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[10] It was conceded by the employer in that case that those of its warehouses which did distribute across state lines were subject to the Act, 317 U. S., at 565.

[11] The Court of Appeals also held that those employees who procured or received the goods from other States were "engaged in commerce" and covered by the Act.

Viewing it as "clear that the purpose of the Act was to extend federal control in this field throughout the farthest reaches of the channels of interstate commerce" (317 U. S., at 567), the Court adopted as a starting point for the inquiry whether a business is "in commerce" within the meaning of the Act, the statement in *Swift & Co. v. United States*, 196 U. S. 375, 398, that "commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business" (317 U. S. at 570).

Applying this principle, the Court held that the "practical continuity of movement of the goods" required to make their whole journey from out-of-State sources through a wholesaler's warehouse to his customers interstate in character was sufficiently shown when the goods were ordered by the wholesaler pursuant to a preexisting contract or understanding with the customer (317 U. S., at 568–569).

Nothing in the opinion in the *Jacksonville Paper Company* case indicates that a trial court's conclusion that the requisite "practical continuity of movement" existed must be reversed in the absence of such preexisting contracts or understandings. The Court said merely that in the case before it, as to transactions not involving such contracts or understandings, "we do not think the Administrator has sustained the burden which is on a petitioner of establishing error in a judgment

which we are asked to set aside" (317 U. S. at 569–570). The opinion explicitly stated that the Court did not mean to imply that "practical continuity in transit" could not be established at times by "a wholesaler's course of business based on anticipation of needs of specific customers, rather than on prior orders or contracts". It did refuse to set aside the judgment below with respect to certain transactions as to which there was evidence only that most of the wholesaler's customers formed a fairly stable group whose orders were recurrent so that the wholesaler could estimate with considerable precision the needs of his trade. But it based this refusal, not upon the absence of prior contracts or understandings, but upon the fact that the evidence lacked "that particularity necessary to show that the goods in question were different from goods acquired and held by a local merchant for local disposition" (317 U. S., at 570).

Since "commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business," we submit that, although the District Court characterized its ruling as a "conclusion of law" (R. 21), Judge Holmes was fundamentally right when he said in his dissenting opinion in the Court of Appeals (R. 33) that the District Court "*found as a fact* that such was the rapidity of movement and the method of handling of goods purchased from out-

side the State that each such transaction was a continuous and unbroken shipment in interstate commerce from without the State through [respondent] into the hands of its customers." [Italics supplied.]

As Judge Holmes also said, the ruling of the District Court that there was continuity of interstate movement "is not erroneous as a matter of law and there is nothing in the record to show that it is untrue as a matter of fact" (R. 33). Goods do not necessarily come to rest because their interstate movement is interrupted to find buyers. See *Swift & Co.* v. *United States;* 196 U. S. 375, 398–399 where the Court said:

> When cattle are sent for sale from a place in one State, with the expectation that they will end their transit, after purchase, in another, and when in effect they do so, with only the interruption necessary to find a purchaser at the stock yards, and when this is typical, constantly recurring course, the current thus existing is a current of commerce among the States, and the purchase of the cattle is a part and incident of such commerce.

That the goods entered the respondent's warehouse and were handled there does not suffice to establish that they then "came to rest." The trial court's findings setting forth respondent's methods of handling the produce show that the goods obviously did not become "commingled with the

mass of property within the State * * * held solely for local disposition and use". *Schechter Corp.* v. *United States*, 295 U. S. 495, 543. Respondent's activities are comparable, not to those of the Schechter Corporation, but to those of the "receivers" from whom that corporation purchased poultry. In the *Schechter* case the Court declared that the interstate commerce continued through the sale by the "receivers" and until delivery to the purchasers' slaughterhouses (pp. 542–543).

Higgins v. *Carr Bros. Co., supra,* involved the applicability of the Fair Labor Standards Act to a wholesale fruit, produce, and grocery business. The decision below, denying coverage, was affirmed by this Court because there was nothing in the record to support petitioner's claim of "an actual or practical continuity of movement of merchandise from without the state to respondent's regular customers within the state", and petitioner had not maintained the burden of showing error in the judgment below. Here, there is nothing in the record to impeach the correctness of the District Court's ruling that there was an actual continuity of movement in this case.

On the contrary, the facts in the record with respect to the rapidity of movement of the produce and respondent's method of handling the merchandise affirmatively support the District Court's decision. The commodities moved rapidly

through respondent's place of business, being unloaded, sorted, packaged, and shipped from respondent's premises, all within one to five days after receipt by respondent; so rapid was the movement that respondent used the refrigerated freight cars in which the goods were received as a storage place, and respondent's produce was not placed on the shelves of a store to be "there held solely for local disposition and use" (see *Schechter Corp.* v. *United States,* 295 U. S. 495, 543), nor did it become part of the stock in trade "held by a local merchant for local disposition" (*Walling* v. *Jacksonville Paper Co.,* 317 U. S. at 570).

We submit, therefore, that even if no substantial part of respondent's produce had been sold by it for shipment out of the State, its employees would nevertheless be covered by the Act as "engaged in commerce" within the rule of the *Jacksonville Paper Company* case.

IV

THE RULING OF THE COURT BELOW ON THE METHOD OF DETERMINING THE SUBSTANTIALITY OF INDIVIDUAL EMPLOYEES' INTERSTATE ACTIVITIES IS UNTENABLE AND WOULD DEFEAT THE PURPOSES OF THE ACT

The District Court found that, in addition to the "substantial amounts" of goods sold to ship chandlers for shipment outside the State, respondent regularly shipped directly to out-of-State customers five percent of its sales, and that respondent's

employees worked on all goods indiscriminately without distinction as to their ultimate destinations (R. 19). Since these interstate sales constituted a regular part of respondent's business and were not inconsequential or sporadic, they clearly suffice to bring respondent within the coverage of the Act, even if respondent's sales in Louisiana are held not to be interstate in character under the rule of the *Jacksonville Paper Company* case. As this Court pointed out in its first decision interpreting the Fair Labor Standards Act, Congress, in this Act, "has made no distinction as to the volume or amount of shipments in the commerce or of production for commerce by any particular shipper or producer": *United States* v. *Darby*, 312 U. S., at 123.[12]

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[12] For lower court decisions under the Act applying this principle see *Schmidt* v. *Peoples Telephone Union of Maryville*, 138 F. (2d) 13 (C. C. A. 8); *Chapman* v. *Home Ice Co.*, 136 F. (2d) 353 (C. C. A. 6); *Sun Pub. Co.* v. *Walling*, 7 Wage Hour Rept. 115 (C. C. A. 6, 1944); *Strand* v. *Garden Valley Telephone Co.*, 51 F. Supp. 898 (D. Minn.); *McKeown* v. *So. Calif. Freight Forwarders*, 6 Wage Hour Rept. 1016 (S. D. Calif.) 1943; *Brown* v. *Minngas*, 51 F. Supp. 363 (D. Minn.); *Ling* v. *Currier Lumber Co.*, 50 F. Supp. 204 (E. D. Mich.); *Muldowney* v. *Seaberg Elevator Co.*, 39 F. Supp. 275 (E. D. N. Y.); *Lewis* v. *Nailling*, 36 F. Supp. 187 (W. D. Tenn.); *Steger* v. *Beard & Stone Elec. Co.*, 4 Wage Hour Rept. 411 (N. D. Tex. 1941); *Nelson* v. *Southern Ice Co.*, 4 Wage Hour Rept. 562 (N. D. Tex. 1941); *Berry* v. *34 Irving Place Corp.*, 6 Wage Hour Rept. 1229 (S. D. N. Y., Nov. 24, 1943); *Philips* v. *Star Overall Dry Cleaning Co.*, 7 Wage Hour Rept. 92 (S. D. N. Y., Jan. 6, 1944).

The Circuit Court of Appeals, although conceding that "manifestly some of the employees are engaged in interstate commerce" (R. 33), ruled that the lower court's injunction could not be sustained because it did not appear which particular employees spent a sufficiently substantial portion of their time in interstate activities to bring them within the coverage of the Act. Apparently the Court of Appeals had in mind this Court's statement in *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, 571–572, that "If a substantial part of an employee's activities" related to interstate transactions, the employee is covered by the Act. We do not believe, however, that this statement can be construed as requiring or suggesting any such methods of determining coverage as those advanced by the Court of Appeals in the instant case. We submit that in the circumstances of this case, where the trial court found the employer's business to include regular and substantial interstate business, and the employees to be engaged indiscriminately in the interstate and intrastate activities, no further showing of coverage was necessary to support the injunction issued by the District Court.

In reversing the District Court's judgment, the court below ruled that, if the functions in connection with respondent's interstate sales were equally handled by all the ten to fifteen employees, the interstate activity of each employee

would affect only a fraction of one percent of respondent's business, and "since the court is not concerned with trifles its injunctive processes would hardly be called forth" (R. 33). Determination of the applicability of the Act upon the basis of any such calculation would produce startling results in obvious conflict with the meaning and purpose of the Act. For example, if the court's reasoning were applied to an employer doing 100 percent interstate business with 1,000 employees, the interstate activities of each employee would relate to only one-tenth of one percent of the employer's interstate business, according to Circuit Judge Waller's mathematics, and no employee would be subject to the Act. The practical effect of this suggested method of determining the substantiality of time spent on interstate business would be to exclude from the benefits of the Act virtually all employees whose interstate and intrastate duties are commingled. Plainly the test must relate to the proportion of employee time spent on interstate activities, and not the proportion of the employer's interstate business on which each employee works.

We think it obvious that the time spent by all an employer's employees as a group on his interstate activities must bear substantially the same relation to their total time as the employer's interstate business bears to his entire business. In the absence of a showing to the contrary, the

normal presumption would be that each employee spends approximately that proportion of his time on the interstate activities. See pp. 36–38, *infra*. In this case, five percent plus a "substantial amount" of the employer's business is definitely subject to the Act (see Points I and II), and it is upon this basis that the applicability of the Act to the respondent must be determined.

The opinion's mathematics suggests that none of respondent's employees would be covered unless he worked on interstate activities a much larger proportion of time than the average employee (R. 32–33). But even if the showing required were only as to the proportion of his time which each employee actually spent on goods in or destined for interstate commerce—and the opinion seems confused as to this—the opportunity would be little more than "a teasing illusion." (*Edwards* v. *California*, 314 U. S. 160, 186.) For when an employee in a factory or warehouse handles commingled goods, some of which will move interstate, neither he nor anyone else will ordinarily know, when he is handling them, whether the particular goods on which he is working will be shipped to interstate or intrastate customers. Even after the shipment has been made, it will be impossible—except in the very simplest situations—to trace it back to the individual employee. Thus, if the fact that a substantial part of an employer's business is inter-

state is insufficient to show that some[13] of his employees are subject to the Act, the burden on any one attempting to enforce the Act would be insuperable where interstate and intrastate activities are commingled.

This Court has recognized the impracticability of conditioning the application of the Act upon the segregation of the interstate business. *United States* v. *Darby*, 312 U. S. 100, 117–118. See also *United States* v. *New York Central R. R.*, 272 U. S. 457, 464. In the case of most wholesalers distributing some of their merchandise in interstate commerce, as in the case of "most manufacturing businesses shipping their product in interstate commerce" (see *United States* v. *Darby, supra,* at 117–118), employees' activities relate indiscriminately to both interstate and intrastate commerce. "An interpretation of the statute which would in practice require segregation of all shipments in interstate commerce" would make enforcement of the Act impossible in numerous cases and would "defeat the purpose of the Act." (See *United States* v. *New York Central R. R., supra,* at p. 464.) Rejecting a comparable suggested interpretation of the Hours of Safety Act, this Court, in *Baltimore & Ohio R. R.*

[13] If some employees worked on interstate goods less than the employer's average, the figure for other employees would have to be greater than the average. The opinion below apparently holds no one subject to the Act unless it is shown that the percentage of time spent by individual employees on interstate activities is greater than the average.

v. *Interstate Commerce Commission*, 221 U. S. 612, 619, speaking through Mr. Justice Holmes, declared that the purpose of Congress "cannot be defeated either by prolonging the period of service through other requirements of the carriers or by the commingling of duties relating to interstate and intrastate operations."

The view that the employer might relieve himself of responsibility under the Fair Labor Standards Act by commingling the interstate and intrastate duties of his employees had its origin in the decision of the Fifth Circuit in the case of *Super-Cold Southwest Co.* v. *McBride*, 124 F. (2d) 90, a suit instituted by an employee. The court there suggested that where the employee's duties were commingled, his recovery was conditioned upon his pointing out "what part of his work was in intra- and what part in inter-state commerce" (at p. 92). This suggestion has been followed, with serious consequences to the enforcement of the Act, by district courts within the Fifth Judicial Circuit, although it has been generally rejected elsewhere.[14] As one court re-

[14] The following cases are typical but by no means exhaustive of those in which the doctrine is disapproved: *Guess* v. *Montague*, 6 Wage Hour Rept. 934 (C. C. A. 4, 1943); *Mid-Continent Pipe Line Co.* v. *Hargrave*, 129 F. (2d) 655 (C. C. A. 10); *Bowie* v. *Gonzalez*, 117 F. (2d) 11 (C. C. A. 1); *Calaf* v. *Gonzalez*, 127 F. (2d) 934 (C. C. A. 1); *Johnson* v. *Phillips-Buttorff Mfg. Co.*, 5 Wage Hour Rept. 112 (Ch. Ct. Tenn. 1942), affirmed, 160 S. W. (2d) 893 (Tenn. 1942), certiorari denied, 317 U. S. 648; *Ashenford* v. *L. Yukon &*

cently commented upon this doctrine, "To impose such a burden upon the employee in such a case [where his interstate activities are not segregable] is effectively to deny him the relief contemplated by the statute." *Berry* v. *34 Irving Place Corp.*, 6 Wage Hour Rept. 1229, 1230, (S. D. N. Y., 1943).[15] And district courts in the Fifth Circuit, in applying the doctrine, have described the burden thus imposed upon employees as "impossible" (*Tucker* v. *Hitchcock,* 44 F. Supp. 874, 879 (S. D. Fla.)); as requiring more than a "Herculean" effort (*Monk* v. *Continental Baking Co.*, 5 Wage Hour Rept. 205, 206 (N. D. Tex. 1942)); and as "an unspeakable burden, almost" (*Moore* v. *Perkins Dry Goods Co.*, 5 Wage Hour Rept. 168, 169 (N. D. Tex. 1942)).

The only practical method for determining the applicability of the Act to employees whose interstate and intrastate duties are commingled is the method outlined by the Fourth Circuit in the case

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Sons, 172 S. W. (2d) 881, 887–888 (Kans. City Mo. Ct. of App.); *Crompton* v. *Baker*, 220 N. C. 52, 16 S. E. (2d) 471 (1941); *Gaskin* v. *Clell Coleman and Sons*, 5 Wage Hour Rept. 581 (C. C. Ky. 1942); *Berry* v. *34 Irving Place Corp.*, 6 Wage Hour Rept. 1229, 1230 (S. D. N. Y., 1943).

[15] The Fifth Circuit's opinion in the *Super-Cold* case, *supra*, also suggested that the employee must further segregate his overtime from his regular time, and show what part of his overtime was in interstate commerce. With respect to this suggestion Judge Rifkind said: "I cannot bring myself to assent to such a proposition. Nowhere in the statute do I find a warrant for such a rule," *Berry* v. *34 Irving Place Corp.*, *supra*, 6 Wage Hour Rept. at 1230.

of *Guess* v. *Montague*, 6 Wage Hour Rept. 934, which appears to be the method impliedly recognized in this Court's decision in the *Darby* case. This method is based upon the natural assumption that where covered and non-covered work is commingled, the fraction of each employee's time devoted to covered work is the same as the fraction of all the work which constitutes covered work.[16] The Fourth Circuit ruled that a prima facie showing, entitling the employee to the protection of the Act, is made where it appears that the employee worked on interstate as well as

[16] A like approach to coverage under the Wagner Act was taken by the Circuit Court of Appeals for the Second Circuit in *National Labor Relations Board* v. *Van Deusen*, 138 F. (2d) 893. Respondent there operated a "contract shop," processing materials furnished by Tiny Town Togs, Inc., into garments which, after further processing by it, were distributed to its customers. It was stipulated that 80 percent of the cloth used by Tiny Town was purchased outside the state and that 90 percent of its total sales were to out-of-state buyers. Respondent argued that, in view of the small proportion of the total Tiny Town work done by him, it was quite possible for all the raw materials used by him to have come from within the State and for all the garments processed by him to have been sold within the State. The Court of Appeals rejected this argument, Judge Clark saying: "But the stipulation of the parties cannot properly be thus construed. Its reasonable interpretation, as well as the natural assumption from the circumstances—no attempt at separation of the interstate and intrastate elements by Tiny Town being suggested—is that the materials received and garments delivered by respondent, however small a part of Tiny Town's total business, represented the same division of materials received from or delivered without the state as did that total business" (138 F. (2d), at 894).

intrastate business and that the two classes of business were commingled in the employer's operations; and that the burden is then upon the employer to produce evidence that certain employees "did not render any service in connection with its interstate business" (6 Wage Hour Rept. at 935). See also Interpretative Bulletin No. 1, par. 5, 1942 Wage Hour Man. 24; Interpretative Bulletin No. 5, par. 9, 1942 Wage Hour Man. 28. Where, as in the instant case, the employer produces no such evidence, and his interstate business is not spasmodic or trifling in amount, but constitutes "a continuous, regular and integral part" of his normal business,[17] a sufficient showing of coverage has been made.[18]

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[17] See *McKeown* v. *So. Calif. Freight Forwarders*, 6 Wage Hour Rept. 1016, 1017 (S. D. Calif. 1943), holding the Act applicable to freight checkers where 7 percent of defendant's business was interstate.

[18] See also *Schmidt* v. *Peoples Telephone Union of Maryville*, 138 F. (2d) 13 (C. C. A. 8), holding the Act applicable to switchboard operators, where only a fraction of one percent of the company's revenue was derived from interstate calls; *Strand* v. *Garden Valley Telephone Co.*, 51 F. Supp. 898 (D. Minn.), holding the Act applicable to telephone operators where 4 percent of the calls were interstate; *Muldowney* v. *Seaberg Elevator Co.*, 39 F. Supp. 275 (E. D. N. Y.), holding the Act applicable to an employee of an elevator manufacturing and repair company whose interstate business amounted to 3/8 of one percent of the company's total business; *Philips* v. *Star Overall Dry Cleaning Co.*, 7 Wage Hour Rept. 92 (S. D. N. Y. 1944), holding the Act applicable to an employee of a commercial laundry, 5 percent of whose business was interstate; *Chapman* v. *Home Ice Co.*, 136 F. (2d) 353 (C. C. A. 6), holding the Act applicable to em-

CONCLUSION

The ruling of the Court of Appeals on each question is erroneous. Its decision should be reversed and the decision of the District Court reinstated.

Respectfully submitted.

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JANUARY 1944.

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ployees of an ice manufacturing company which sent only about 6 percent of its output outside of the State; *Sun Pub. Co.* v. *Walling*, 7 Wage Hour Rept. 115 (C. C. A. 6, 1944) holding the Act applicable to employees of a newspaper, 2 to 3 percent of whose circulation was out of the State. And see *Warren-Bradshaw Drilling Co.* v. *Hall*, 317 U. S. 88 where this Court held the employee entitled to recover under the Act on the ground that "*some* of the oil produced ultimately found its way into interstate commerce" (317 U. S. at 91) (italics supplied). "The Court did not say how much nor whether the amount made any difference" (*Berry* v. *34 Irving Place Corp.*, *supra*, 6 Wage Hour Rept., at 1230).

APPENDIX

FAIR LABOR STANDARDS ACT, 52 STAT. 1060 (29 U. S. C., SEC. 201 ET SEQ.)

Sec. 2. (a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.

* * * * *

SEC. 3. As used in this Act—

* * * * *

(b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof. * * *

* * * * *

Sec. 6. (a) Every employer shall pay to each of his employees who is engaged in commerce or

in the production of goods for commerce wages at the following rates—

(1) during the first year from the effective date of this section, not less than 25 cents an hour,

(2) during the next six years from such date, not less than 30 cents an hour,

(3) after the expiration of seven years from such date, not less than 40 cents an hour, or the rate (not less than 30 cents an hour) prescribed in the applicable order of the Administrator issued under section 8, whichever is lower, and

(4) at any time after the effective date of this section, not less than the rate (not in excess of 40 cents an hour) prescribed in the applicable order of the Administrator issued under section 8.

* * * * *

Sec. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

* * * * *

Sec. 15. (a) After the expiration of one hundred and twenty days from the date of enactment of this Act, it shall be unlawful for any person—

(1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 6 or section 7, or in violation of any regulation or order of the Administrator issued under section 14; except that no provision of this Act shall impose any liability upon any common carrier for the transportation in commerce in the regular course of its business of any goods not produced by such common carrier, and no provision of this Act shall excuse any common carrier from its obligation to accept any goods for transportation;

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No. 436

In the Supreme Court of the United States

OCTOBER TERM, 1943

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

JAMES V. REUTER, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONSE TO MOTION TO RECALL WRIT OF CERTIORARI

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The above case is pending in this Court upon a writ of certiorari granted November 22, 1943 (R. 35). On February 4, 1944, counsel for respondent filed a motion to recall the writ on the ground that after it issued, respondent, a Louisiana corporation, had been dissolved, thus rendering the case moot.

The Solicitor General, on behalf of petitioner, respectfully submits that the motion should be denied. The facts relied upon as grounds for such denial are contained in the printed record and in the annexed affidavit of Alexander E. Ral-

ston, Jr.[1] They are summarized below in connection with the argument in opposition to the motion.

QUESTION PRESENTED

The district court enjoined James V. Reuter, Inc. (a Louisiana corporation), its officers, and agents from violating the Fair Labor Standards Act. This judgment was reversed by the circuit court of appeals, and this Court granted certiorari. Subsequently James V. Reuter, Inc., was dissolved and its business continued by James V. Reuter, who had been the president and dominant stockholder of the corporation. The question is whether dissolution of the corporation requires the dismissal of the proceeding in this Court.

STATEMENT

This case arose on a complaint filed by the Administrator of the Wage and Hour Division, United States Department of Labor, against a Louisiana corporation, James V. Reuter, Inc., praying for an injunction restraining violations of the Fair Labor Standards Act[2] (R. 1–5). After trial the district court entered a judgment restraining "defendant, its agents, servants, employees and attorneys, and all persons acting or claiming to act in its behalf or interest" from

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[1] The original of this affidavit has been filed in the office of the Clerk. A copy is reprinted as an Appendix hereto, pp. 19–32, *infra*.

[2] Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, 29 U. S. C. 201.

violating the minimum wage, overtime and record-keeping provisions of the Act (R. 23–24). The circuit court of appeals reversed this judgment, holding that many of respondent's employees were not covered by the Act (R. 27–33, 34). On the Administrator's petition this Court granted a writ of certiorari (R. 35).

Thereafter, on December 15, 1943, proceedings were initiated to liquidate and dissolve respondent (Affidavit, pp. 30–31, *infra*). Pursuant to the Louisiana corporation laws,[3] Mr. and Mrs. James V. Reuter and Mrs. Rosemary N. Burg, who represented that they were the sole shareholders,

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[3] Louisiana Act 250 of 1928. Section 54 of this act provides that the shareholders of the corporation may resolve that the affairs of the corporation be wound up out of court and may name a liquidator. Under Section 57, unless restrained in the appointment, the liquidator has full power to collect assets, ascertain and settle liabilities, sue and defend suits and make distribution of the net assets. Under Section 61 (II) the liquidator supersedes the directors in their powers and duties. During the liquidation, however, the corporation remains in existence and retains title to all of its assets. In winding up the business, among the duties of the liquidator is that of "prosecuting, defending, or comprising * * * all litigation pending in which the corporation is a party." *McCoy* v. *State Line Oil and Gas Co.*, 180 La. 579, 585, 157 So. 116, 118. Section 62 of the act declares that when the "corporation has been completely wound up," the "liquidator * * * shall sign and acknowledge a certificate stating that the corporation has been completely wound up and is dissolved." This certificate must be delivered to the Secretary of State who files it in his office; "thereupon the corporate existence shall terminate and the Secretary of State shall issue a certificate of dissolution" to be recorded in the parish where the corporation does business.

consented to the liquidation of respondent and appointed James V. Reuter liquidator (*id.*, pp. 21, 30, *infra*). At this time Reuter held a majority of the shares (Affidavit, p. 19, *infra*). On December 16 (the next day) Reuter certified that he had wound up the corporation and it was dissolved (Motion, p. 14).[4] According to counsel's statement, the "purpose of the dissolution of James V. Reuter, Inc. was to enable James V. Reuter to operate the corporate business as an individual and thereby to avoid corporate taxes" (Affidavit, p. 19, *infra*). After the dissolution Reuter did, in fact, operate the same business at the same place employing the same employees (*id.*, p. 20, *infra*).

The record does not show directly how far the corporation was dominated by Reuter during the period in which the alleged violations of the Fair Labor Standards Act occurred but there are several additional facts from which inferences may be drawn. James V. Reuter, Inc. was incorporated in 1935 (*id.*, pp. 22–27, *infra*). James V. Reuter was one of the three ~~original incorpo-~~

[4] The certificate appears to have been made improperly. One of the duties of a liquidator under Louisiana law is to prosecute, defend or compromise all litigation against the corporation and until that is done the certificate of dissolution should not be made. The pendency of this case itself makes Reuter's certificate inaccurate. Hence, if this were a case in the Louisiana courts, petitioner could on motion have respondent's dissolution set aside. *McCoy* v. *State Line Oil and Gas Co.*, *supra*.

rators and directors and one of the three shareholders (*ibid.*). He and Mrs. Reuter were named as the registered agents (*id.*, p. 24, *infra*). A report of an increase of capital stock, recorded in 1936, shows that at that time Reuter was president, and Mrs. Reuter secretary, of the corporation (*id.*, pp. 28–29, *infra*). When the corporation was dissolved, Reuter was a majority stockholder; the only other stockholders were Mrs. Reuter and one of the original incorporators, Mrs. R. N. Burg (*id.*, pp. 19, 26. 30–31, *infra*). So that we might inform the Court both as to the proportion of the shares held by each of the three shareholders and as to the distribution of its assets made on dissolution, we requested Frank S. Normann, Esquire, counsel for James V. Reuter, Inc. and for James V. Reuter, to give us the necessary information. Mr. Normann, although he knows the facts, refused to disclose them (*id.*, pp. 19, 22, *infra*).

ARGUMENT

Under the Louisiana corporation law respondent no longer exists, even for purposes of suit. Counsel for respondent urges that this dissolution requires that the present case be dismissed, first, on the ground that the case is now moot because the Court cannot give any effectual relief; and second, on the ground that the dissolution abates all litigation against respondent. In our view both contentions lack merit. As to the first, we submit that the injunction decree, which would

be reinstated by this Court upon reversal of the judgment of the circuit court of appeals, would bind Reuter individually while he is carrying on the business, and that, therefore, a controversy exists in which effectual relief may be granted (pp. 7–14, *infra*). As to the second contention, although it is true that dissolution of a corporation abates all proceedings against it if no judgment has been entered, nevertheless the dissolution does not abate appellate proceedings following a judgment in the trial court against the corporation (pp. 14–17, *infra*).

Since the judgment in the case will affect Reuter individually, and since the dissolution of respondent prevents him from speaking through it as a party, it would seem appropriate that he be made a party in this Court in order to defend his interests. This could be accomplished by substitution in a manner similar to that provided for in Rule 19. Compare also Federal Rule of Civil Procedure 25. For the reasons we have stated and discuss below, the substitution is unnecessary to the continuation of the case and therefore we see no reason for substituting Reuter against his will. If, however, Reuter should ask to be substituted we should not oppose the motion; on the contrary, we believe that the Court should grant it. Cf. *Federal Trade Comm.* v. *Standard Education Society*, 302 U. S. 112.

I

THE INJUNCTION ENTERED BY THE DISTRICT COURT, IF REINSTATED, WILL BIND REUTER INDIVIDUALLY WHILE HE CONTINUES THE BUSINESS

The facts set forth above (pp. 2–5, *supra*) make it plain that the business of the corporation James V. Reuter, Inc., was in substance the business of James V. Reuter the individual. Certainly, it is a fair inference that he controlled the stock and dominated the corporate activities. In the first place, the distribution of the stock and of the corporate offices is typical of a "one man" or "family" corporation. Reuter and his wife were two of the three stockholders and were the president and secretary of the corporation and its registered agents. Reuter also became its liquidator. Second, the speed and ease with which the liquidation was accomplished and the business turned over to Reuter to operate indicate that he had always had complete control. Third, the decision to dissolve respondent was made to advance Reuter's business interests. According to counsel, "the purpose of the dissolution of James V. Reuter, Inc., was to enable James V. Reuter to operate the corporate business as an individual and thereby to avoid corporate taxes" (Affidavit, p. 19, *infra*). If other stockholders had had a real interest in the business, something more than Reuter' tax advantage would have required consideration. Fourth, counsel for respondent and

for Reuter has refused to furnish information showing how the corporate shares were divided among the three shareholders and how its assets were distributed upon liquidation. This information, particularly if put in form to show the actual beneficial ownership and control and not just the legal holdings, would be very material. As long as it is withheld, the inference is justified that the information would be damaging to respondent's contentions (cf. *Interstate Circuit* v. *United States*, 306 U. S. 208, 225–226), and, in conjunction with the other facts noted, any failure to give it to the Court compels the conclusion that the dissolution of respondent was a change of form and not of substance—in other words, that there is "merely a disguised continuance of the old employer" (*Southport Petroleum Co.* v. *National Labor Relations Board*, 315 U. S. 100, 106).

Under these circumstances Reuter is bound by the injunction decree entered against the corporation. The injunction runs against "defendant, its agents, servants, employees and attorneys, and all persons acting or claiming to act in its behalf" (R. 23). Ordinarily, corporate officers and agents are bound only to take proper steps to bring about compliance by the corporation and are not bound by an injunction in their individual capacity unless they are otherwise in contempt. *Parker* v. *United States*, 126 F. (2d) 370, 379 (C. C. A. 1); *Harvey* v. *Bettis*, 35 F. (2d) 349, 350 (C. C. A.

9). "It is an established exception to this rule, however, that an equity court will not permit changes in the form of a corporate or individual enterprise to be used to frustrate its decrees. An individual cannot escape an injunction against him arising out of his business activities by forming a corporation to carry on the business. *Bernard* v. *Frank*, 179 Fed. 516 (C. C. A. 2); cf. *Frank F. Smith Metal Window Hardware Co.* v. *Yates*, 244 Fed. 793 (C. C. A. 2); *A. B. Dick Co.* v. *Marr*, 48 F. Supp. 775 (S. D. N. Y.). Likewise, a decree against one corporation will bind a second corporation which has substantially the same officers and stockholders and succeeds to the business of the first. *Campbell* v. *Magnet Light Co.*, 175 Fed. 117 (C. C. N. Y.); *Farmers' Fertilizer Co.* v. *Ruh*, 7 Oh. App. 430; *Sperry & Hutchinson Co.* v. *McKelvey Hughes Co.*, 64 Pa. Super. 57; cf. *Iowa Barb Steel Wire Co.* v. *Southern Barbed-Wire Co.*, 30 Fed. 123 (C. C. Mo.). And where an individual is not merely an officer or employee but dominates the activities of a corporation against which an injunction is issued, he does not escape the injunction by carrying on the enterprise as an individual. Compare *Donaldson* v. *Roksament Stone Co.*, 178 Fed. 103 (C. C. N. Y.) (mere employee not bound) with *Donaldson* v. *Roksament Stone Co.*, 176 Fed. 368 (C. C. N. Y.) (president and principal figure in corporation bound while carrying on same business as an

individual); *Katenkamp* v. *Superior Court*, 16 Cal. (2d) 696; cf. *Mayor* v. *New York Ferry Co.*, 64 N. Y. 622. In all such cases, of course, it is immaterial whether the successor to the enterprise was a party to the original litigation or named in the decree. See also *In re Lennon*, 166 U. S. 548; *Bessette* v. *Conkey*, 194 U. S. 324.

These principles, as the cited cases show, have been invoked most frequently in patent litigation. The same principles, however, have been applied in other fields of law and neither reason nor authority suggests that their usefulness as a means of securing justice is limited to any particular class of cases. E. g., *Jewelers Assn.* v. *Rothschild*, 39 N. Y. Supp. 700; *Farmers' Fertilizer Co.* v. *Ruh, supra; Sperry & Hutchinson Co.* v. *McKelvey Hughes Co., supra; Katenkamp* v. *Superior Court, supra;* cf. *Cantrell & Cochrane Ltd.* v. *Witteman*, 180 Fed. 794 (C. C. N. Y.); *Avery* v. *Andrews*, 51 L. J. R. 414.[5] They are not only applicable but should be given broad scope in enforcing decrees under remedial statutes regulating the employment relationship (the National Labor Relations Act and the Fair Labor Standards Act, for example), for such legislation is concerned not so much with private rights as

[5] In the case last cited the court said, "If anybody, though not a person actually named in the injunction, chooses to step into the place of a man who was named, and to do the act which he was enjoined from doing, he has committed a very gross contempt of this court."

with relationships between employees and the business unit in which they are employed. "It is the employing industry that is sought to be regulated and brought within the corrective and remedial provisions of the Act in the interest of industrial peace" (*National Labor Relations Board* v. *Colten*, 105 F. (2d) 179, 183 (C. C. A. 6)).

The rule for which we contend has already been invoked by this Court in a comparable situation. The decision in *Southport Petroleum Corp.* v. *National Labor Relations Board*, 315 U. S. 100, shows clearly that Reuter is bound by the decree against his corporation. In that case evidence was offered to show that a corporation had been dissolved after it was ordered to reinstate certain employees discharged in violation of the National Labor Relations Act, and its business transferred to another corporation. This Court held (p. 106):

> If there was merely a change in name or in apparent control there is no reason to grant the petitioner relief from the Board's order of reinstatement; instead there is added ground for compelling obedience. Whether there was a *bona fide* discontinuance and a true change of ownership—which would terminate the duty of reinstatement created by the Board's order—or merely a disguised continuance of the old employer, does not clearly appear, and accordingly is a question of fact properly

to be resolved by the Board on direct resort to it, or by the court if contempt proceedings are instituted.

See also *National Labor Relations Board* v. *Hopwood Retinning Co.*, 104 F. (2d) 302 (C. C. A. 2).

The cases cited by counsel for respondent are distinguishable. *United States* v. *Hamburg-American S. S. Co.*, 239 U. S. 466, arose out of a suit to restrain violations of the anti-trust laws by an international steamship cartel; the outbreak of war rendered the case moot because continuation of the combination under war conditions was impossible. *Mills* v. *Green*, 159 U. S. 651, was held to involve a moot case because the purpose of plaintiff's suit was to establish his right to vote in an election and the election had already been held. In those cases "the intervening event is owing * * * to a power beyond the control of either party" (*Hamburg American* case, p. 477), or there was nothing upon which the judgment could operate (cf. *St. Pierre* v. *United States*, 319 U. S. 41). Neither of these factors is present here, inasmuch as the dissolution can hardly be said to have been caused by matters beyond respondent's control and the judgment can still be operative as against the business conducted by Reuter.

We submit, therefore, that on the facts which now appear, Reuter would be bound by the injunction if the decree of the circuit court of appeals were reversed; it follows that this Court

can grant effectual relief. Even if the factual issue of Reuter's relationship to respondent be thought doubtful, the doubt should be resolved in favor of continuation of the case. In the first place, if parties may successfully escape from the effect of adverse decisions, or avoid the reversal of favorable ones on appeal, by changing the form of their business, as was done here, effective law enforcement will be greatly impeded; the Government might be compelled to bring action after action in order to follow an elusive defendant from one form of enterprise to another. In dealing with a similar problem, this Court declared in *United States* v. *Trans-Missouri Freight Association,* 166 U. S. 290, 309:

> If the mere dissolution of the association worked an abatement of the suit as to all the defendants, as is the claim made on their part, it is plain that they have thus discovered an effectual means to prevent the judgment of this court being given upon the question really involved in the case. The defendants having succeeded in the court below, it would only be necessary thereafter to dissolve their association and instantly form another of a similar kind, and the fact of the dissolution would prevent an appeal to this court or procure its dismissal if taken. This result does not and ought not to follow.

See also to the same effect *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission,*

219 U. S. 498, 514–516. In addition, a decision on the merits will not be a nullity, since it will in practical effect at least determine the rights of respondent's employees to recover for past violations under Section 16 (b) of the Act.[6] See *Southern Pacific Co.* v. *Interstate Commerce Commission*, 219 U. S. 433, 452, in which the possible liability of railroads for reparations was held to warrant review of an expired Interstate Commerce Commission order.

II

THE DISSOLUTION OF RESPONDENT DOES NOT ABATE THE APPELLATE PROCEEDING IN THIS COURT

At common law the dissolution of a corporation before judgment, like the death of a natural person, abates the action against it. *Mumma* v. *Potomac Co.*, 8 Pet. 280; *Pelican Oil & Gasoline Co.* v. *Commissioner*, 128 F. (2d) 561 (C. C. A. 5). For example, in *First National Bank of Selma* v. *Colby*, 21 Wall. 609, cited in the motion, it appeared that the corporate defendant had been dissolved almost two years before trial, and it was held that the action abated.[7]

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[6] The employee's right to recovery for unpaid wages due under the Act remains in existence against the stockholders of the dissolved corporation. *Ortego* v. *Nehi Bottling Works*, 182 So. 365 (1938); *Stock* v. *E. A. Fabacher, Inc.*, 185 So. 48 (1938).

[7] In *Oklahoma Natural Gas Co.* v. *Oklahoma*, 273 U. S. 257, the Court said without qualification: "as the death of a natural person abates all pending litigation to which such

But this rule does not apply to appellate proceedings after a judgment for the plaintiff. Even a cause of action for tort becomes merged in the judgment and takes on the aspects of a property right which may be enforced, in the case of an individual, against his estate. Hence, it is settled that the death of a natural person does not abate appellate proceedings which may result in affirmance of a judgment rendered during his life. *Coughlin* v. *District of Columbia,* 106 U. S. 7; *Bell* v. *Bell,* 181 U. S. 175; *Castelluccio* v. *Cloverdale Dairy Products Co.,* 165 La. 606; Note, 62 A. L. R. 1048, and cases cited. For like reasons dissolution of a corporation after judgment against it does not abate the proceedings on appeal. In *Knickerbocker Life Ins. Co.* v. *Pendleton,* 112 U. S. 696, affirmed on rehearing, 115 U. S. 339, this Court reviewed on writ of error a judgment against an insurance company which was dissolved during the proceedings on the writ. In *Pendleton* v. *Russell,* 144 U. S. 640,

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person is a party, dissolution of a corporation abates all litigation to which the corporation is appearing either as plaintiff or defendant." Although counsel for respondent relies upon this statement to support his motion, it is apparent for two reasons that the Court was speaking only of litigation in the trial courts. In the first place the opinion speaks of the dissolution of a corporation as having the same effect as the death of a natural person; it is clear that death does not abate an appeal. See pp. 15–16, *infra.* Secondly, the Court cited *Pendleton* v. *Russel,* 144 U. S. 640, as authority; that very case holds that dissolution of a corporation after a judgment against it does not abate a writ of error or appeal. *Ibid.*

at another stage in the same litigation, the Court noted that the dissolution had not abated the previous appellate proceedings, saying (p. 646)—

> Had the original judgment * * * been affirmed, instead of being reversed, it having been rendered when the insurance company was in existence, it would have stood as a valid claim against the assets of that company after its dissolution.

See also *Rider* v. *Union Factory,* 30 Am. Dec. 495 (Va.); *May* v. *State Bank,* 2 Rob. (Va.) 56.

It makes no difference that in the instant case the judgment of the district court had been reversed by an intermediate appellate court. The reversal did not entirely destroy the judgment. The statutes give opportunity for further review and during that period the judgment retains sufficient potential existence to keep the proceedings alive. *Coughlin* v. *District of Columbia,* 106 U. S. 7, is directly in point. See also *Carr* v. *Rischer,* 119 N. Y. 117 (1890); *Ellis* v. *Brooks,* 101 Tex. 591, 102 S. W. 94, 103 S. W. 1196 (1908); *Lewis* v. *St. Louis & I. M. R. Co.,* 59 Mo. 495 (1875); *Lew* v. *Lee* [1924] S. C. R. (Can.) 612, [1925] 1 D. L. R. 179; Note, 62 A. L. R. 1048, 1051–1053.

The instant case, it is true, does not involve a money judgment enforceable against the corporate property, such as is involved in the precedents

upon which we rely, but the difference is immaterial. The decisions cited show that no defect of parties exists which would require abatement of the suit, and the injunction decree, although it can no longer affect the corporation, will, if reinstated, effectively bind Reuter himself (see pp. 7–14, *supra*).

There is an added reason for applying these principles to the instant case. Reuter has taken over the business of the corporation while the litigation is pending and with knowledge that the decree of the circuit court of appeals might be reversed by this Court. In *G. & C. Merriam Co.* v. *Saalfield,* 190 Fed. 927 (C. C. A. 6), the defendant, previously a stranger to the enterprise, took over a corporation's business during trade-mark litigation against it and was held bound by the decree although he was not a party to the original suit. The court's reasoning applies *a fortiori* to a case such as this, in which the successor also dominated the old business. "If a third party may thus come into acquisition of rights involved in pending litigation without being bound by the final judgment, and require a suit de novo in order to bind him, he might, pending that suit, alienate that right to another with the same result, and a final decree bearing fruit could never be reached" (p. 932).

CONCLUSION

It is respectfully submitted that the motion to recall the writ of certiorari should be denied.

CHARLES FAHY,
Solicitor General.

DOUGLAS B. MACGS,
Solicitor of Labor.

FEBRUARY 1944.

APPENDIX

AFFIDAVIT OF ALEXANDER E. RALSTON, JR.

CITY OF BIRMINGHAM,
Jefferson County, State of Alabama, ss:

BEFORE ME, the undersigned authority, a Notary Public in and for the County and State aforesaid, duly qualified and commissioned, personally came and appeared:

ALEXANDER E. RALSTON, JR., a person of the full age of majority and presently residing in the aforesaid City, County and State and domiciled in the Parish of Orleans, State of Louisiana, who being by me first duly sworn did depose and say, that:

He is an Associate Attorney in the Office of Solicitor, United States Department of Labor, with his official station at New Orleans, Louisiana.

Affiant, on January 19, 1944, was informed by Frank S. Normann, counsel for James V. Reuter and for the corporation James V. Reuter, Inc., that James V. Reuter owned a majority of the stock in James V. Reuter, Inc., at the time of its dissolution on December 31, 1943, and that the purpose of the dissolution of James V. Reuter, Inc., was to enable James V. Reuter to operate the corporate business as an individual and thereby to avoid corporate taxes. Mr. Normann is also counsel of record for James V. Reuter, Inc. in the cause now pending in the Supreme Court of the United States entitled "L. Metcalfe Walling v. James V. Reuter, Inc."

Affiant was further informed by Mr. Normann that, upon the dissolution of James V. Reuter, Inc., James V. Reuter, as individual proprietor, continued the operation of the said corporation's wholesale fruit and vegetable business without change in manner or place of doing business.

Affiant was further advised by Mr. Normann that, to his knowledge, James V. Reuter, in continuing the operation of the said business, retained the same employees who had been employed by James V. Reuter, Inc.

Affiant, on January 18, 1944, visited the premises at 817 Decatur Street, New Orleans, Louisiana, where the business of James V. Reuter, Inc. had been conducted and observed a freshly painted sign attached to the building and upon which appeared the name "James V. Reuter." James V. Reuter was present in the building and stated to affiant that he is now operating the business as an individual.

Affiant has personally examined all official records pertaining to James V. Reuter, Inc., filed in the Office of the Recorder of Mortgages for the Parish of Orleans.

Affiant, in his examination of the aforesaid official records, found a record of the charter of James V. Reuter, Inc., recorded on July 26, 1935 in Mortgage Office Book 1493, Folio 494, in which James V. Reuter appeared as one of three original incorporators and directors and in which James V. Reuter and Mrs. James V. Reuter were named as registered agents. A certified copy of this record is annexed hereto and made a part hereof as the best evidence of its contents and

has been signed by affiant for identification with this affidavit.

Affiant, in his examination of the aforesaid official records, found a record of the "Report of Stock of James V. Reuter, Inc." recorded on September 25, 1936, in Mortgage Office, Book 1509, Folio 408, in which James V. Reuter appeared as president of the said corporation and Mrs. Clara Dietrich Reuter appeared as its secretary and which was signed by James V. Reuter, President of James V. Reuter, Inc. and Mrs. James V. Reuter, Secretary of James V. Reuter, Inc. A certified copy of this record is annexed hereto and made a part hereof as the best evidence of its contents and has been signed by affiant for identification with this affidavit.

Affiant, in his examination of the aforesaid official records, found a record of the "Consent to Dissolution of James V. Reuter, Inc." recorded on December 16, 1943, in Mortgage Book, Book 1666, Folio 46, in which James V. Reuter, Clara D. Reuter, and R. N. Burg appeared and stated that "they are the sole and only shareholders of all the outstanding shares of stock in James V. Reuter, Inc." This affidavit is signed by James V. Reuter, Clara D. Reuter and R. N. Burg. A certified copy of this record is annexed hereto and made a part hereof as the best evidence of its contents and is signed by affiant for identification with this affidavit.

Affiant, in his examination of the aforesaid official record, was unable to find any record specifying the number of shares held by James V. Reuter, Clara D. Reuter, and R. N. Burg, respectively, of the stock of James V. Reuter,

Inc., nor was affiant able to find any record specifying the nature and amount of the property distributed to each of these individuals upon the liquidation of James V. Reuter, Inc. Affiant is familiar with the Louisiana laws pertaining to the filing and recording of corporation records and believes there is no other office in which such information has been filed for public record.

To the knowledge of affiant, this information concerning the distribution of shares in James V. Reuter, Inc. among its three stockholders and showing the manner in which its assets were distributed upon liquidation can be supplied by James V. Reuter or by his attorney, the aforesaid Frank S. Normann. Affiant, on February 8, 1944, requested Mr. Normann to furnish him with this information; Mr. Normann refused this request.

(Sgd.) ALEXANDER E. RALSTON, Jr.

Sworn to and subscribed before me this 14th day of February, 1944.

ESTHER ANNIE TEMERSON,
Notary Public.

[SEAL] Comm. expires 10–31–46.

UNITED STATES OF AMERICA,
State of Louisiana, Parish of Orleans.

BE IT KNOWN, that on this 24th day of the month of July, in the year of our Lord one thousand nine hundred and thirty-five, and of the Independence of the United States of America, the one hundred and Sixtieth.

Before me, Frank S. Normann, A Notary Public, duly commissioned and qualified in and for the

Parish of Orleans, State of Louisiana, and therein residing, personally came and appeared the several subscribers hereto, all of the full age of majority, who declared to me, Notary, in the presence of the undersigned competent witnesses, residing in the State and Parish aforesaid, availing themselves of the provisions of Act No. 250 of the Louisiana Legislature of 1928, they do hereby organize themselves, their successors and assigns, into a corporation, pursuant to said Act under and in accordance with the following Articles of Incorporation:

ARTICLE I

The name and title of this corporation is "James V. Reuter, Inc."

ARTICLE II

The objects and purposes for which this corporation is organized and the nature of the business or businesses to be carried on by it, are stated and declared to be as follows, namely:

(a) To operate and carry on the businesses of a wholesale or retail dealer in groceries, vegetables, produce, poultry, eggs and dairy products, of every description whatsoever.

(b) To buy and sell, either outright or on commission or consignment, groceries, vegetables, produce, poultry, eggs and dairy products, of every description whatsoever.

(c) To act as agent, factor or commission merchant, relative to the purchase and sale by others of groceries, vegetables, produce, poultry, eggs and dairy products, of every description whatsoever.

(d) To purchase, lease, or otherwise acquire, land, buildings, and warehouses, whether in Louisiana or elsewhere, and whether necessary for the conduct of its businesses or otherwise.

(e) To have offices and warehouses, conduct the businesses and promote its objects within and without the State of Louisiana, in other States or in foreign countries, without restriction or amount.

ARTICLE III

The duration of this corporation shall be ninety-nine (99) years from the date hereof.

ARTICLE IV

The location and post office address of this corporation is No. 817 Decatur Street, New Orleans, Louisiana.

ARTICLE V

The full names and post office addresses of the registered agents of this corporation are:

(1) James V. Reuter, 2523 Esplanade Avenue, New Orleans, La.

(2) Mrs. James V. Reuter, 2523 Esplanade Avenue, New Orleans, La.

ARTICLE VI

The total authorized number of shares issued by this corporation is fifty (50) shares, each having a par value of One Hundred ($100.00) Dollars.

ARTICLE VII

The amount of paid-in capital with which this corporation shall begin business is Five Thousand

($5,000.00) Dollars, which, upon the execution of these articles has been paid in cash.

ARTICLE VIII

The names of the first Directors, their post-office addresses and the terms of office are as follows:

James V. Reuter, 2523 Esplanade Avenue, New Orleans, La.
Miss Sarah McQuillan, 1318 Eighth Street, New Orleans, La.
Mrs. Rosemary N. Burg, 2765 Gladiola Street, New Orleans, La.

The Directors named hereinabove shall hold office only until the election of their successors at the first general meeting of the shareholders of the corporation, or until such successors have qualified.

Unless and until otherwise provided in the by-laws, all of the corporate powers of this corporation shall be vested in, and the business and affairs of the corporation shall be managed by, a Board of three (3) Directors, who shall be elected by the shareholders at their annual meeting.

The general annual meeting of the shareholders for this election of Directors shall be held at the registered office of the corporation, and shall take place on the last Monday of July of each year, or the first business day thereafter when such day is a legal holiday, unless or until otherwise provided in the bylaws.

The Board of Directors shall have authority to make and alter bylaws, including the right to make or alter bylaws fixing their qualifications,

classification, or term of office, or fixing or increasing their compensation, subject to the powers of the shareholders to change or repeal the by-laws so made.

Any director absent from director's meeting may be represented by any other Director or shareholder, who may cast the vote of the absent Director, according to the written instructions, general or special, of said absent director, filed with the Secretary.

Article IX

The names and post-office addresses of the incorporators, and a statement of the numbers of shares subscribed by each, are as follows:

James V. Reuter, 2924 Esplanade Avenue, New Orleans, La., 1 share.
Miss Sarah McQuillan, 1318 Eighth Street, New Orleans, La., 25 shares.
Mrs. Rosemary N. Burg, 2765 Gladiola Street, New Orleans, La., 24 shares.

Article X

The meetings of the shareholders of this corporation shall be prescribed in the bylaws thereof.

Article XI

The corporation may purchase or redeem its own shares in the manner and under the conditions provided in Sections 23 and 45 of said Act No. 250 of 1928. Such shares so purchased shall be considered treasury shares, and may be reissued and disposed of as authorized by law, or may be cancelled and the capital stock reduced,

as the Board of Directors, may, from time to time, determine.

ARTICLE XII

This corporation claims, and shall have the benefit of the provisions of Section 63 of said Act No. 250 of 1928.

This done and signed in my office in the Parish and State aforesaid, on the day and year above written, in the presence of the undersigned competent witnesses and me, Notary, after due reading of the whole.

Witnesses:

HENRY G. McMAHON,
PAT MAUFFRAY.

(Signed) JAMES V. REUTER,
SARAH McQUILLAN,
ROSEMARY N. BURG.

(Sig.) FRANK S. NORMANN,
Notary Public.

New Orleans, Louisiana, July 26, 1935, 10.55 A. M. A. J. Mayer, Clk.

I hereby certify that this is a true and correct copy of the Charter of James V. Reuter, Inc., recorded in M. O. B. 1493, Folio 494.

[SEAL] A. L. ROLFES,
Dy. Recorder of Mortgages.

UNITED STATES OF AMERICA,
State of Louisiana,
Parish of Orleans, City of N. O.

Be it known, That on this 18th day of the month of September in the year of our Lord, One Thousand Nine Hundred and Thirty-Six:

Before me, Frank S. Normann, a Notary Public, duly commissioned and qualified in and for the Parish of Orleans, State of Louisiana, therein residing and in the presence of the witnesses hereinafter named and undersigned: Personally came and appeared James V. Reuter, President and Mrs. Clara Dietrich Reuter, Secretary to me personally known and known to me to be respectively the President and Secretary of James V. Reuter, Inc., a corporation created under the laws of this State and domiciled in this City, as fully appears by an act passed before the undersigned Notary dated the 24th day of July 1935 and duly recorded in the office of the Recorder of mortgages for the Parish of Orleans on July 26th, 1935 in book 1493, Folio 494 and filed and recorded in the office of the Secretary of State in Record of Charters, No. 151 on August 13th, 1935.

And the said appearers in their respective capacities declared that by virtue of and pursuant to a consent resolution of all of the shareholders of the said James V. Reuter, Inc., adopted at a meeting held at its domicile in this City on the 18th day of September 1936 all of the shareholders consented and unanimously resolved that the authorized capital stock of the Corporation be increased and that Article Six (6) of the Charter of James V. Reuter, Inc., be changed, modified and altered so as to hereafter read as follows:

ARTICLE 6

The total authorized number of shares is Two Hundred and Fifty (250) Shares each having a par value of One Hundred ($100.00) Dollars.

And the said appearers in their said capacities further declared that they were duly authorized by the aforesaid consent resolution a duplicate original of which is annexed hereto and made part hereof as though written herein in extenso, to take such steps and to do all things and execute any and all acts in writing on behalf of this corporation as might in their opinion be necessary or proper to legally and effectually carry out the action of the shareholders of this Corporation.

Therefore the said appearers have declared unto me, Notary in the presence of the undersigned witnesses, that Article Six, (6) of the charter of James V. Reuter, Inc., was and is hereby amended as aforesaid and that they desire to have this act in evidence thereof recorded according to law.

Thus done and passed in my office in said City of New Orleans on the day, month and year first above written in the presence of the two undersigned witnesses both of full age and residents of this Parish competent witnesses who have signed hereto with said appearers and me, Notary after due reading of the whole.

(Sgd.) JAMES V. REUTER,
President of James V. Reuter, Inc.,
(Sgd.) MRS. JAMES V. REUTER,
Secretary of James V. Reuter, Inc.

Witnesses:
(Sgd.) IRENE M. DOIZE,
(Sgd.) HORACE M. ROUCHELL.

(Sgd.) F. NORMANN, *N. P.*

New Orleans, La., September 25, 1936, 10:50 A. M., R. McFeely, Clerk.

I hereby certify that this is a true and correct copy of the Report of Stock of JAMES V. REUTER, INC., recorded in M. O. B. 1509, Folio 408.

[SEAL] A. L. ROLFES,
Dy. Recorder of Mortgages.

CONSENT OF SHAREHOLDERS FOR DISSOLUTION OF CORPORATION

We, the undersigned Shareholders of James V. Reuter, Inc., hereby consent to the immediate voluntary Dissolution out of Court of James V. Reuter, Inc., and do hereby appoint James V. Reuter, #817 Decatur Street, New Orleans, Louisiana, as Liquidator thereof with full power and authority to Liquidate and Dissolve said Corporation and without Bond.

Thus Done and Signed at New Orleans, La., on this the 15th day of December 1943.

(Sgd.) JAMES V. REUTER,
Shareholder,

(Sgd.) CLARA D. REUTER,
Shareholder,

(Sgd.) R. N. BURG,
Shareholder.

STATE OF LOUISIANA,
Parish of Orleans, ss:

Before me, the undersigned authority, personally came and appeared James V. Reuter, Clara D. Reuter, R. N. Burg, who after being duly sworn by me, Notary, did depose and say that they are the sole and only Shareholders of all the outstanding Shares of Stock in James V. Reuter, Inc., that they are the same persons whose Signature appear in the foregoing consent, and

that they have executed same in their capacity as Shareholders of James V. Reuter, Inc.

(Sgd.) JAMES V. REUTER.
(Sgd.) CLARA D. REUTER.
(Sgd.) R. N. BURG.

Sworn and subscribed to before me, this 15th day of December, 1943.

(Sgd.) F. N. NORMANN,
Notary Public.

New Orleans, Louisiana, December 16th 1943 @ 12.45 P. M. Wm. Hecker, Clerk.

I hereby certify that this is a true and correct copy of the Consent to Dissolution of James V. Reuter, Inc., recorded in M. O. B. 1666, Folio 46.

[SEAL] A. L. ROLFES,
Dy. Recorder of Mortgages.

STATE OF LOUISIANA.

I, the undersigned Assistant Secretary of State, of the State of La., do hereby certify that consent to dissolve James V. Reuter Inc, domiciled at N. O. LA., and the appointment of James V. Reuter, 817 Decatur St. N. O., signed and acknowledged by the Stockholders before a N. P. on the fifteenth day of December 1943, with proof of publication of notice of dissolution as required by Section 54 of Act 250 of 1928, as amended by Act 65 of 1932, and certificate of the Liquidator showing that the affairs of the Corp, have been completely wound up & dissolved, in compliance with Section 62 of Act 250 of 1928, as amended acknowledged before a N. P. on the seventeenth day of December, 1943, have been filed in this office on this the thirty-first day of December,

1943, recorded in Book "Record of Charters" No. 184. Folio—and the Corporation stands dissolved.

Given under my signature authenticated with the impress of my seal of office at the City of Baton Rouge this 31st day of Dec. A. D. 1943.

(Sgd.) H. C. COMISH,
Assistant Secretary of State.

New Orleans La., January, 10th, 1944 at 3:10 P. M. Wm. Hecker, Clk.

I hereby certify that this is a true and correct copy of the Certificate of Dissolution of James V. Reuter, Inc., recorded in M. O. B. 1658, Folio 304.

[SEAL] A. L. ROLFES,
Dy. Recorder of Mortgages.

U. S. GOVERNMENT PRINTING OFFICE: 1944

IN THE

Supreme Court of the United States

October Term, 1943.

No. 436

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR,

Petitioner,

versus

JAMES V. REUTER, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

FRANK S. NORMANN,
Attorney for Respondent.

NORMANN & ROUCHELL, and
CARLOS E. LAZARUS,
1605 Hibernia Bank Building,
New Orleans, La.,
Of Counsel.

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On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

OPINIONS BELOW.

The findings of fact and conclusions of law of the District Court (R. 30-37) are reported in 49 F. Supp. 485. The opinion of the Circuit Court of Appeals (R. 47-52) is reported in 137 F. (2d) 315.

JURISDICTION.

The jurisdiction of this Court is based on Section 240 (a) of the Judicial Code as amended by the Act of February 13th, 1925.

QUESTIONS PRESENTED.

1. Was the Circuit Court of Appeals warranted in holding that respondent's employees when packing, hauling, and delivering food to vessels for the provisioning of the crew were not within the provisions of the Act?

2. Was the Circuit Court of Appeals warranted in holding that produce purchased out-of-State came to rest when placed on respondent's place of business?

3. Are employees engaged in sorting, selecting, repackaging and otherwise handling produce without regard to the final destination thereof engaged in the production of goods for commerce within the meaning of the Act?

4. Was the Circuit Court of Appeals warranted in holding there was no showing that respondent's employees spent a substantial portion of their time in interstate activities?

STATUTE INVOLVED.

The pertinent provisions of the Fair Labor Standards Act are set forth in the Appendix.

STATEMENT.

This suit was brought by the Administrator of the Wage and Hour Division on January 23rd, 1942, to enjoin the respondent, a Louisiana Corporation, from violating certain provisions of the Fair Labor Standards Act (R. 2-8).

Briefly, the facts as found by the District Court are as follows: Respondent is engaged in purchasing, selling and distributing fresh fruits and vegetables, and it employs from 10 to 15 employees, including office help, warehousemen and truckdrivers. (R. 30.) Approximately 50% of the produce sold by respondent is purchased from out-of-state sources. This produce arrives in refrigerated railroad cars which average from 12 to 20 per month, and are delivered to respondent's private switch track. (R. 30-31.) These cars are used by respondent as temporary night storage for produce that may be on hand at the end of the day (R. 32) thereby availing itself of the refrigeration remaining therein after arrival. All the vegetables arriving from other states are unloaded from the freight cars and brought to respondent's place of business to be uncrated, unpacked and examined before being sold (R. 31). Because of their perishable nature, the District Court found there was a rapid turnover of the produce sold by the respondent (R. 32).

Respondent sells fully 95% of all its produce to wholesalers and retail merchants in the City of New Orleans, only 5% of the total yearly sales being made to out-of-state customers (R. 31). Respondent's warehouse employees sort, select, repackage and handle the produce

received, without distinction as to its ultimate destination, orders being made from stores on hand (R. 31-32). Respondent also sells produce to local ship chandlers who purchase same to provision boats sailing out of the port of New Orleans, but the bulk of this produce is picked up by the ship chandlers themselves in their own trucks at respondent's place of business (R. 32). Occasionally, however, respondent's truck drivers deliver some of this produce to the docks (R. 32). The hours worked by the warehousemen and truck drivers were found to range from 55 to 75 hours per week (R. 33) the truck drivers spending not more than one and one-half (1½) hours a day in unloading produce from the freight cars and hauling it to respondent's place of business (R. 31).

The District Court held (1) that because of the rapidity in turnover of goods received from out-of-state sources, there was a continuity of movement of such goods from out-of-state on to respondent's customers, whether local or distant, and that therefore respondent's employees were engaged in commerce within the meaning of the Act (R. 35); (2) that employees engaged in sorting, picking over, handling and packaging produce in respondent's place of business without regard to the final destination thereof, were producing goods for commerce within the meaning of the Act (R. 34); (3) that the employees who prepared and shipped orders to out-of-state customers and those who prepared and delivered orders to ship chandlers for provisioning of vessels on their voyages were engaged in commerce within the meaning of the Act (R. 34).

The Circuit Court of Appeals reversed and remanded the case on the grounds that (1) the lower court erred

in ruling that the produce had not come to rest at respondent's premises; (2) that employees delivering goods to ship chandlers and to ships for the provisioning of the crew were not engaged in commerce within the meaning of the Act; (3) that in the absence of a showing that a substantial portion of the time of respondent's employees was spent in interstate activities, the fact that 5% of the total sales of defendant are made to out-of-state customers, is insufficient to establish they were within the provisions of the Act; (4) that the lower court erred in holding that the sorting, repackaging and handling of goods constituted production of goods for commerce within the meaning of the Act.

ARGUMENT.

As we understand it, petitioner's position is that since the exclusion clause of Section 3(i) of the Act defining "goods" does not apply to the *production* or the handling of goods prior to their delivery to the ultimate consumer, the Circuit Court erred in holding that the employees of respondent engaged in delivering produce to vessels for the consumption of their crews were not within the provisions of the Act. The fallacy of this argument is that it assumes the very point to be established, namely, that respondent's employees were engaged either in commerce, or in the production of goods for commerce, in the first instance.[1] But the Circuit Court held that when the produce was

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[1] Delivery of goods to an ultimate consumer would be a delivery in commerce only if such delivery is a part of a continuous movement in interstate commerce.

unloaded at respondent's place of business, the interstate character of their movement terminated,[2] so that any subsequent movement thereof was purely intrastate. Moreover, the Circuit Court also held that respondent's employees were not engaged in the production of goods for commerce.[3] Of necessity, then, the decision of the Court below must be predicated on its holding that the produce had come to rest when delivered to the respondent's place of business, from which follows that the respondent's employees who, occasionally delivered the produce to the docks, were not delivering "goods" within the meaning of Section 3 (i) of the Act, since the vessel was not a producer, manufacturer or processor thereof. The decisions in *Hamlet Ice Co. v. Fleming, 127 F. (2d) 165; Chapman v. Home Ice Co., 136 F. (2d) 353* and *Atlantic Co. v. Walling, 131 F. (2d) 518*, on which petitioner strenuously relies, are not apposite to the facts here presented, nor in conflict with the holding of the Circuit Court. Those cases involved the production and delivery of ice for use in the refrigeration of interstate shipments of perishable products and the decisions were predicated on the fact that the production of ice intended for refrigeration of perishables to be transported in interstate commerce was so closely related to commerce as to be a part and parcel thereof.[4] As pointed out by the Circuit Court such is not the case here, and we adopt the reasoning of the Circuit Judge that the supply-

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[2] James V. Reuter v. Walling, 137 F. (2d) 315, 319.

[3] "We disagree with the legal conclusion of Paragraph 4 of the Conclusion of the lower Court that the defendant's employees were engaged in the production of goods for commerce * * *" James V. Reuter v. Walling, supra, at p. 318.

[4] "It is idle, therefore, to deny that the production of ice intended for refrigeration of perishable merchandise in transportation is not a necessary element of transportation * * *" Chapman v. Home Ice Company of Memphis, 136 F. (2d) 353, 355.

ing of food for the consumption of the crew of a vessel, is not so intimately connected to interstate commerce as to be an integral part thereof.

2. Petitioner's second ground in support of the issuance of the writ is based upon the erroneous belief that the District Court found as a matter of fact that there was a continuity of movement in interstate commerce of the produce received by respondent from out-of-state until delivered to respondent's customers, whether local or distant. All the District Court found was a rapidity of turnover due to the perishable nature of the vegetables, from which the District Court erroneously concluded there was a continuity of movement. We challenge the doctrine that because there is a rapidity of turnover of a perishable, there is a continuity of movement in interstate commerce. According to the decisions of this Court in *Walling v. Jacksonville Paper Co., 317 U. S. 564, 63 S. Ct. 332,* and *Higgins v. Carr Bros. Co., 317 U. S. 572, 63 S. Ct. 337,* something more than mere rapidity of turnover is essential to establish continuity of interstate movement.[5] As clearly stated by the Circuit Court the term "coming to rest" must be considered in its relation to the commodity, and it can not be said that because a perishable cannot be kept indefinitely, it may not come to rest. To use the language of the Circuit Court:

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[5] Cf. Walling v. Jacksonville Paper Company, 317 U. S. 564, 63 S. Ct. 332 where it was held that the mere fact that customers of the company formed a fairly stable group; that their orders were recurrent as to kind and amount; and that the company was in a position to order his goods in anticipation of demand, did not necessarily establish a continuity of movement in interstate commerce. See also, Higgins v. Carr Bros. Co., 317 U. S. 572, 63 S. Ct. 337. And Walling v. Siver Bros. Co., 136 F. (2d) 168 (C. C. A. 1st) where the court holds that the mere fact that there is a rapid turnover of perishable goods does not of itself establish a continuity of movement.

> "The rest period of an axe handle could be far greater than the rest period of a tomato, and the perishable nature of the commodity alone would not place the vegetable merchant under the Act when the hardware merchant is not, merely because the axe handle could endure a longer period of repose than a tomato. *Vegetables do not have to 'come to rot' in order to order to 'come to rest.'*" *James V. Reuter v. Walling*, 137 F. (2d) 315, 319. (Italics supplied.)

Furthermore, the District Court affirmatively found that the vegetables are uncrated, examined, sorted, repackaged, sold and delivered upon arrival at respondent's place of business; that 95% of the produce was finally disposed of to the local trade within two to five days after arrival from points outside the state. There was no finding that respondent had prior contracts with its customers. In all instances buyers had to be found willing to buy, and pay for produce of the quality and price offered. As said by the Circuit Court, **"these miscellaneous tasks are time-consuming and are inconsistent with continuity of movement."**[6] There is no difference between the facts as presented by this record and those brought out in the *Higgins Carr Company* case. There, respondent was engaged in the sale of fresh fruits and vegetables buying most of its merchandise out-of-state; the produce was delivered to its warehouse and from there it was distributed to the trade. It made no sales on commission or on order, and there were no shipments direct to the purchaser. These facts, it was held, were insufficient to establish a continuous movement in interstate commerce.

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[6] (R. 51.)

3. The Circuit Court reversed, without discussion, the lower court's conclusion that the employees of defendant who sorted, handled and packaged the produce, **without regard to the final destination thereof,** were producing goods for commerce.[7] Petitioner contends that the court erred in so doing because under Section 3(j) of the Act production includes the "handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State." In other words, petitioner would have the Court hold that because respondent's employees "handled" the produce received by respondent at its place of business, after it had come to rest therein, they were necessarily engaged in the "production of goods for commerce". If petitioner's interpretation of the statute is correct, then the mere *handling* of the produce and the mere *transportation* thereof would constitute a production, and every person engaged in handling and transporting goods in interstate commerce would necessarily be engaged in "production". Such we believe, was not the avowed intention of Congress for, it is to be noted that the scope of the Act includes two classes of employees,—those engaged in the production of goods for interstate commerce, and those merely engaged in interstate commerce.[8] When it is con-

[7] (R. 34.)

[8] That a person may well be engaged "in commerce" and not in the "production of goods for commerce" is evident from the decisions in Kirschbaum v. Walling, 316 U. S. 517, 62 S. Ct. 1116, 86 L. Ed. 1638 and Johnson v. Dallas Downtown Development Co., 132 F. (2d) 287 (C. C. A. 5th), and related cases. In the Kirschbaum case, it was held that employees in loft buildings, the tenants of which were engaged in the production of goods for commerce, were likewise so engaged because they were engaged in an activity necessary to such production. In the Johnson case, it was held however, that such employees were not engaged in the production of goods for commerce, because the tenants of the building were merely engaged in interstate commerce.

sidered that the Circuit Court determined the produce received by respondent had come to rest at its place of business, and, as found by the District Court, that 95% of the produce was sold locally, only 5% being sold to customers outside the State,[9] the reason for the Court's failure to discuss the question at length is evident. Had respondent sold its entire produce locally, it could not be successfully contended that the preparation of orders to be delivered would constitute a "production of goods for commerce" simply because they were "handled" by respondent's employees. Does the mere fact that 5% of the sales were made to out-of-state customers, change the character of the "handling" so as to convert it into a "production"? The obvious answer to petitioner's argument is that it is not every "handling" which will constitute a "production" within the meaning of the Act, but only such handling *as is necessary to the production of goods for commerce.*[10]

Petitioner relies upon the case of *Fleming v. Kenton Loose Leaf Tobacco Warehouse Co., 41 F. Supp. 225*, decided by the District Court for the Eastern District of Kentucky. While the Court did say that a warehouseman whose sole function was to lend its agencies to growers and sellers of tobacco for the sale of the tobacco in interstate commerce was a "producer" as defined by the Act, because it was a *"handler of a product moving in interstate commerce"* it is submitted that the decision rested on the fact that defendant and its employees were engaged "in commerce" and not in the production of goods for in-

[9] Findings of Fact #4, (R. 31).

[10] This is more evident from the very limitation contained in the definition which limits the "handling or transportation" to cases where it is necessary to the production of goods.

terstate commerce. At any rate, the case is distinguishable from the case at bar in that respondent's employees were not HANDLING THE PRODUCE IN INTERSTATE COMMERCE, nor was the handling or transportation thereof a necessary step in aid of or necessary to the manufacture or fabrication of any products.[11] Respondent in this case is not engaged in the manufacture or production of any articles; how then can it be said that its employees are so engaged?

4. The District Court found that respondent's employees, namely, the warehousemen and truck drivers, worked from 55 to 75 hours a week,[12] and that the truck drivers spent not more than one and one-half (1½) hours a day "unloading freight cars and hauling the produce to respondent's place of business,"[13] The rest of their time was obviously spent in the intrastate activities of delivering orders to the local trade. As to the packers and warehousemen, however, no showing has been made regarding the time spent in intrastate and interstate activities, and obviously, they were engaged in both. In the absence of any definite showing of the actual time each employee engaged in interstate activities, it was impossible for the Circuit Court to ascertain, with any degree of accuracy, what portion of their time was actually so spent, and for that reason, the case was remanded for further evidence. To say that because 5% of the respondent's total sales were to out-of-state customers, its employees spent a sub-

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[11] See Calaf v. Gonzales, 127 F. (2d) 934 (C. C. A. 1st) wherein it was held that employees engaged in the transportation and handling of sugar cane from the farms to the mill were engaged in the production of goods for commerce, because it was incidental to and necessary to the manufacture of sugar.

[12] Finding of Fact #8 (R. 33).

[13] Finding of Fact #3 (R. 31).

stantial portion of their time in interstate commerce would be begging the question. Of course, the Circuit Court's decision must be interpreted in the light of all facts presented to it, and it cannot be given the broad construction petitioner attempts to impart upon it. Naturally, if as contended by petitioner, an employer is doing 100% interstate business, all of its employees would be engaged in interstate activities, whether they worked one hour or one hundred hours. Conversely, when only 5% of the employer's business is "in commerce", the greater portion of the employees' time must necessarily be spent in local activities, in the absence, of course, of evidence showing that one particular individual attended to all of this phase of the business. In such cases, the necessity of showing the proportion of time spent in interstate and intrastate activities is evident, the question being one of law for the court to determine. Where, as in this case, there is an absolute failure to prove how much of the work done is interstate and how much intrastate, the court is powerless to determine the question, and the case must be remanded for further evidence. *Super Cold South West Co. v. McBride, 124 F. (2d) 90 (C. C. A. 5th); White Motor Co. v. Littleton, 124 F. (2d) 92 (C. C. A. 5th); Jax Beer Co. v. Redfern, 124 F. (2d) 287 (C. C. A. 5th).*

CONCLUSION.

The basis for the decision of the Circuit Court of Appeals in all of the questions presented rests primarily upon the holding that the produce came to rest when delivered

to the respondent's place of business. The delivery of this produce was made by the truck drivers, who are admittedly excluded from the overtime provisions of the Act. There remains only the other employees of respondent, as to whom petitioner would have the court hold they were engaged in interstate activities simply because they prepared for shipment 10 to 12 small packages a day to out-of-state customers, without showing that they actually spent a substantial portion of their time in this activity. Petitioner's contention that the District Court found there was a continuity of movement can not be seriously urged in the absence of a specific finding of fact to that effect, and such a finding has not been made. Its conclusion in this respect is, as has been shown, unsound.

We respectfully submit, therefore, that the writ of certiorari be denied.

FRANK S. NORMANN,
Attorney for Respondent.

NORMANN & ROUCHELL, and
CARLOS E. LAZARUS,
1605 Hibernia Bank Building,
New Orleans, La.,
Of Counsel.

APPENDIX.

Fair Labor Standards Act, 52 Stat. 1060 (29 U. S. C. A., Sec. 201, et seq.):

> Sec. 3 (i). "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

> Sec. 3 (j). "Produced" means produced, manufacturned, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.

IN THE

Supreme Court of the United States

October Term, 1943.

No. 436.

L. METCALFE WALLING, Administrator of the Wage and Hour Division, United States Department of Labor,

Petitioner,

versus

JAMES V. REUTER, INC.,

Respondent.

MOTION TO RECALL WRIT OF CERTIORARI.

FRANK S. NORMANN,
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MOTION TO RECALL WRIT OF CERTIORARI.

Now into Court comes Frank S. Normann, counsel of record for James V. Reuter, Inc., formerly a Louisiana corporation, domiciled in the City of New Orleans, and made Respondent herein, and moves the court to recall the order granting the writ of certiorari herein, upon the following grounds:

1. This cause has become moot in that: After the writ of certiorari was granted, James V. Reuter, Inc., original defendant and respondent herein, was dissolved on the 17th day of December, 1943, pursuant to the laws of the State of Louisiana, under and by virtue of which it was created, whereupon its legal existence terminated. (See Appendix Exhibit "C".)

This motion is filed under the authority of United States Supreme Court Rule 7, as adopted February 13th, 1939, and is based on the affidavit of James V. Reuter, the last and former president of the defunct corporation, respondent herein, and on the Certificate of Dissolution of the Secretary of State of the State of Louisiana, dated December 31st, 1943, both of which are attached hereto and made part hereof, as Appendix Exhibits "A" and "B", pages 8 and 12.

Respectfully submitted,

FRANK S. NORMANN,
1605 Hibernia Bank Bldg.,
New Orleans, La.,
Attorney for Mover.

NORMANN & ROUCHELL and
CARLOS E. LAZARUS,
1605 Hibernia Bank Bldg.,
New Orleans, La.
Of Counsel.

STATEMENT.

This suit was brought on January 23rd, 1942, by the Administrator of the Wage and Hour Division to enjoin the respondent, then a Louisiana corporation, from violating certain provisions of the Fair Labor Standards Act (R. 1-5.)

The District Court for the Eastern District of Louisiana held that the defendant below had committed some of the violations alleged, and accordingly, on April 9th, 1943, entered a judgment enjoining the defendant from further violating the pertinent provisions of the statute involved (R. 23). The Circuit Court of Appeals for the Fifth Circuit reversed and remanded the case for further proceedings on the grounds the lower court was in error in its appreciation of the applicable law (R. 34), and thereafter, on the application of counsel for the Administrator of the Wage and Hour Division, a writ of certiorari was granted by this Court on November 22nd, 1943 (R. 35) [64 S. Ct. 205].

On December 17th, 1943, James V. Reuter, Inc., the original defendant and respondent herein was legally dissolved in accordance with and under the laws of the State of Louisiana and its existence thereupon terminated.

ARGUMENT.

It is now well established that this Court will not proceed to a determination of a cause when its judgment

would be wholly ineffectual for want of a subject matter on which it could operate. *Mills v. Green, 159 U. S. 651, 16 S. Ct. 132, 40 L. Ed. 293; United States v. Hamburg-American S. S. Co., 239 U. S. 466, 36 S. Ct. 212, 60 L. Ed. 287.* As was said by this Court in *Mills vs. Green, supra:*

> (16 S. Ct. 133.) "The duty of this Court * * * is to decide actual controversies by a judgment which can be carried into effect. * * * It necessarily follows that when pending an appeal from the judgment of the lower court * * * an event occurs which renders it impossible for this court to grant * * * any effectual relief whatever, the court will not proceed to judgment but will dismiss the appeal."

An action pending against a corporation abates upon the dissolution of the corporation and thereupon all litigation terminates, unless the law under which it was created prolongs the life of the entity for purposes of litigation beyond the date of dissolution. *First National Bank of Selma v. Colby, 21 Wall. 609, 88 S. Ct. 609, 22 L. Ed. 687; Oklahoma Natural Gas Company v. State of Oklahoma, 273 U. S. 257, 47 S. Ct. 391.* In the last cited case, this court said:

> (47 S. Ct. 392.) "* * * at Common law and in Federal jurisdiction, a corporation which has been dissolved is as if it did not exist, and the result of the dissolution can not be distinguished from the death of a natural person in its effect. * * * It follows, therefore, that as the death of the natural person abates all pending litigation to which such a person is a party, dissolution of a

> corporation at common law abates all litigation in which the corporation is appearing either as plaintiff or defendant. To allow actions to continue would be to continue the existence of the corporation *pro hac vice*. But corporations exist for specific purposes and only by legislative act so that if the life of the corporation is to continue even only for litigating purposes it is necessary that there should be some statutory authority for the prolongation. The matter is really not procedural or controlled by the rules of the court in which the litigation pends. It concerns the fundamental law of the corporation enacted by the state which brought the corporation into being."

There is nothing in the corporation law of the State of Louisiana which prolongs the life of corporations, once dissolved according to law, for the purposes of suit, and it follows, therefore, that an injunction could no more issue against respondent in this case, than is could against a dead person.

In this case, the judgment of the lower court enjoined respondent corporation from violating the provisions of the Fair Labor Standards Act. It is clear that in order to be operative, there must be a person against whom the judgment can be enforced, and in the absence of such, no judgment that this court could render could be carried into effect. If the judgment of the Circuit Court of Appeals, which reversed and remanded the case for further proceedings is affirmed, its judgment could not be carried into effect because of the non-existence of the defendant against whom the suit was filed. If, on the other hand, the judgment of the Circuit Court is reversed

and the judgment of the District Court reinstated, the same will be ineffective, also because of the non-existence of the person against whom the injunction is directed. The case is, therefore, moot. *First National Bank of Selma v. Colby, supra; Oklahoma Natural Gas Co. v. State of Oklahoma, supra.*

2.

The case being moot, further proceedings can neither be had in this court, nor in the court of first instance. To dismiss the writ of certiorari, purely and simply, would leave the judgment of the Circuit Court of Appeals requiring the remand of the case for further proceedings notwithstanding the defendant no longer exists. The appropriate proceeding, therefore, according to the established practice in this court under similar circumstances is to reverse the judgment of the Circuit Court of Appeals and to remand the case with directions to dismiss the suit. *Commercial Cable Company v. Burleson, 250 U. S. 360, 39 S. Ct. 512, 63 L. Ed. 1030; Brownlow v. Schwartz, 261 U. S. 216, 43 S. Ct. 263, 67 L. Ed. 620.* As was said in the *Brownlow* case, *supra:* "The practice now established by this Court under similar conditions and circumstances, is to reverse the judgment below and remand the case with directions to dismiss the bill, complaint or petition." It is submitted, therefore, that the writ of certiorari heretofore granted should be recalled, and that the judgment of the Circuit Court should be reversed and

the case remanded with directions that the suit be dismissed.

Respectfully submitted,

FRANK S. NORMANN,
1605 Hibernia Bank Bldg.,
New Orleans, Louisiana,
Attorney for Mover.

APPENDIX.

EXHIBIT "A".

Affidavit of Former President of James V. Reuter, Inc., Dissolved.

State of Louisiana,
Parish of Orleans.

Before me the undersigned Notary Public in and for the Parish of Orleans, State of Louisiana, personally came and appeared, James V. Reuter, a resident of the City of New Orleans, Parish of Orleans, State of Louisiana, a person of age, who declared unto me, Notary:

That James V. Reuter, Inc., a corporation organized and formerly existing under and by virtue of the laws of the State of Louisiana, domiciled at 817 Decatur Street, in the city of New Orleans, Louisiana, was legally dissolved on the 17th day of December, in the year 1943, in accordance with Section 62 of Act 250 of 1928 of the Louisiana Legislature, and that a certificate of dissolution showing that the said corporation stands as dissolved was issued by the Assistant Secretary of State of the State of Louisiana under date of December 31, 1943, as will appear from a photostatic copy attached hereto and made part hereof.

Affiant says by virtue of Section 54 of the Louisiana Business Corporation Act 250 of 1928, as amended by Section 1 of Louisiana Act 65 of 1932, a corporation may be dissolved by the unanimous consent of all of the shareholders. That the consent to dissolve may provide that the affairs of the corporation be wound up out of court, in which case the shareholders must appoint a liquidator. (See Par. I of Sec. 54 of Louisiana Act 250 of 1928, as amended, Ex. D, page 15.)

Your affiant shows as will appear from Exhibit C, par. I, page 13, all of the shareholders of James V. Reuter, Inc., by unanimous consent agreed to dissolve said corporation and appointed one of the shareholders, James V. Reuter, Esq., as the liquidator to wind up the affairs of the corporation out of court. (See Exhibit D, page 15, par. II.)

That as will appear from Exhibit B, page 12, the Assistant Secretary of State of the State of Louisiana, has acknowledged compliance with the Louisiana Business Corporation Act as to proof of publication of notice of dissolution as required by Par. II (a) of Sec. 54 of Act 250 of 1928, as amended.

Affiant further shows in compliance with Par. II (b), of Section 54 of Act 250 of 1928, Exhibit D, the consent to dissolve was signed and acknowledged by all the shareholders of said corporation. (See Exhibit C, page 13.)

Affiant further says in compliance with Par. II (c) of Sec. 54 of Act 250 of 1928, the consent to dissolve was filed in the office of the Secretary of State of the State of Louisiana (see Exhibit B) as well as in the office of the Recorder of Mortgages for the Parish of Orleans in which Parish the corporation had its registered office. (See Exhibit C, page 13.)

Affiant further says by virtue of Section 64 of the Louisiana Business Corporation Act 250 of 1928, any corporate action may be had by unanimous consent without a meeting of shareholders. (See Exhibit E, page 17.)

Affiant further says, in compliance with Section 62, Par. I, of the Louisiana Business Corporation Act 250 of 1928, (See Exhibit F, page 18) the liquidator of said

corporation signed a certificate and acknowledged that the corporation had been completely wound up and dissolved. (See Exhibit C, page 13.)

That in further compliance with the foregoing Section 62, Par. II, (Exhibit F), the liquidator delivered to the Secretary of State the certificate provided for in the above paragraph, who filed the same in his office, whereupon the corporation's existence terminated and a certificate of dissolution was issued evidencing that fact. (See Exhibit B, page 12.) That said certificate of dissolution was recorded in the office of the Recorder of Mortgages in the Parish of Orleans in which Parish the corporation had its registered office.

Affiant further says that said corporation ceased to exist as a corporate entity upon the issuance of the certificate of dissolution issued by the Assistant Secretary of State of the State of Louisiana, and that the corporation is not now nor has it been transacting any business nor is it permitted to transact any business since the date of its dissolution.

That the said dissolved corporation has not applied for nor has it renewed its license application to continue in business, nor could it make such an application by reason of having been dissolved.

That the business of the corporation has been completely liquidated and the former shareholders have received in return for their stockholdings their pro-rata interest in and to the assets of the dissolved corporation.

That this affidavit is made in support of the motion filed with the Supreme Court of the United States to recall the Writ of Certiorari granted in the case of L. Metcalfe Walling, Administrator of the Wage and Hour Division,

United States Department of Labor, Petitioner, versus James V. Reuter, Inc., respondent, No. 436 of the Docket of said Court.

(Sgd.) JAMES V. REUTER.

Sworn to and subscribed before me this 26th day of January, 1944.

(Sgd.) F. S. NORMANN,
Notary Public in and for the Parish of Orleans, State of Louisiana.

Exhibit "A", Affidavit filed in original form.

Exhibits "B" and "C" are photostatic copies, showing original recordations of Parish Official and Assistant Secretary of State.

EXHIBIT "B".

State of Louisiana

I, the undersigned Assistant Secretary of State, of the State of Louisiana, do hereby certify that consent to dissolve James V. Reuter, Inc., domiciled at New Orleans, Louisiana, and the appointment of James V. Reuter, 817 Decatur Street, New Orleans, signed and acknowledged by the stockholders, before a Notary Public, on the fifteenth day of December, 1943, with proof of publication of notice of dissolution, as required by Section 54 of Act 250 of 1928, as amended by Act 65 of 1932, and certificate of the liquidator showing that the affairs of the corporation have been completely wound up and dissolved, in compliance with Section 62 of Act 250 of 1928, as amended, acknowledged before a Notary Public on the seventeenth day of December, 1943, have been filed in this office on this the thirty-first day of December, 1943, recorded in book "Record of Charters" No. 184, folio ...., and the corporation stands dissolved.

Given under my signature, authenticated with the impress of my Seal of office, at the City of Baton Rouge, this 31st day of December, A. D. 1943.

H. C. COMISH,
Assistant Secretary of State.

I, the undersigned Recorder of Mortgages in and for the Parish of Orleans, State of Louisiana, do hereby certify that the above and foregoing act of Dissolution of James V. Reuter, Inc., was this day duly recorded in my office in Book 1658, folio 304, New Orleans, 1-10-1944 at 3:10 P. M.

J. O'HANLON, D. R.

EXHIBIT "C".

Consent of Shareholders for Dissolution of Corporation.

We, the undersigned shareholders of James V. Reuter, Inc., hereby consent to the immediate voluntary dissolution out of court of James V. Reuter, Inc., and do hereby appoint James V. Reuter, 817 Decatur Street, New Orleans, Louisiana, as liquidator thereof with full power and authority to liquidate and dissolve said corporation and without bond.

Thus done and signed at New Orleans, La., on this the 15th day of December, 1943.

(Sgd.) JAMES V. REUTER,
Shareholder,
(Sgd.) CLARA D. REUTER,
Shareholder,
(Sgd.) R. N. BURG,
Shareholder.

State of Louisiana,
Parish of Orleans. ss.

Before me, the undersigned authority, personally came and appeared:

James V. Reuter,
Clara D. Reuter,
R. N. Burg,

who, after being duly sworn by me, Notary, did depose and say that they are the sole and only shareholders of all the outstanding shares of stock in James V. Reuter, Inc., that they are the same persons whose signatures appear in the foregoing consent, and that they have executed same in their capacity as shareholders of James V. Reuter. Inc.

(Sgd.) JAMES V. REUTER,
(Sgd.) CLARA D. REUTER,
(Sgd.) R. N. BURG.

Sworn and subscribed to before me this 15th day of December, 1943.

(Sgd.) F. S. NORMANN,
Notary Public.

Certificate.

I, James V. Reuter, duly appointed liquidator of James V. Reuter, Inc., by the unanimous consent of the shareholders thereof, do hereby certify that the said corporation has been completely wound up and is dissolved.

Wherefore, I, as liquidator, hereby request that a Certificate of Dissolution by the Secretary of State, declaring the dissolution of the said James V. Reuter, Inc.

(Sgd.) JAMES V. REUTER,
Liquidator.

State of Louisiana,
Parish of Orleans. ss.

Before me, the undersigned authority, personally came and appeared: James V. Reuter, who deposed that he is the liquidator of James V. Reuter, Inc., and as such authorized make the above certificate, and that all the statements therein made are true.

(Sgd.) JAMES V. REUTER.

Sworn and subscribed to before me this 16th day of December, 1943.

(Sgd.) F. S. NORMANN,
Notary Public.

The undersigned Recorder of Mortgages in and for the Parish of Orleans, State of Louisiana, do hereby certify that the above and foregoing Act of Dissolution of the James V. Reuter, Inc., was this day duly recorded in my office in Book 1666, Folio 46.

New Orleans, 12-16-1943, at 12:45 P. M.

(Sgd.) J. O'HANLON,
Dep. Rec.

EXHIBIT "D".

Extracts from Section 54 of Act 250 of the Louisiana Legislature of 1928, as Amended by Section 1 of Act 65 of 1932.

Section 54: Voluntary Proceedings for Dissolution.

I. Voluntary proceedings for dissolution may be commenced whenever a resolution to dissolve is adopted by the holders of at least two-thirds of the voting power, or such larger percentage as the articles may provide, at a shareholders' meeting duly called for that purpose, or by unanimous written consent as provided in Section 64.

II. The resolution or consent may provide that the affairs of the corporation shall be wound up out of court, in which case the shareholders must, at the same time, appoint a liquidator or liquidators to conduct the winding up, but such appointment shall not be operative until

(a) Notice of adoption of such resolution or signing of such consent, stating also whether or not the corporation is to be wound up out of court, and if so, giving the names and post-office addresses of the liquidators named in such resolution or consent, shall have been published in a newspaper of general circulation in the parish in which the corporation's registered office is located at least one time, and a copy thereof, with the affidavit of the publisher of such newspaper to the fact of such publication attached, has been filed with the Secretary of State; and

(b) Duplicate copies of such resolutions, duly certified by the secretary of the corporation or of the meeting, shall have been signed and acknowledged by at least one shareholder authorized so to do by said meeting, or by a

majority of the directors, or by the shareholders holding a majority of the voting power of all shares; or if such proceedings be commenced without a meeting, but by written consent, duplicate copies of such consent shall have been signed by all such shareholders and acknowledged by at least one of them; and

(c) One of such copies shall have been filed for record in the office of the Secretary of State, and the other copy filed for record in the office of the recorder of mortgages of the parish in which the corporation has its registered office.

EXHIBIT "E".

Extract from Section 64 of Act 250 of the Louisiana Legislature of 1928.

Section 64: Any corporate action may be had by unanimous consent without a meeting of shareholders.

I. Whenever by any provision of this act or the articles, the affirmative vote of all or a certain percentage of shareholders having voting power, and/or of one or more classes of shareholders having voting power, on the particular question, is made necessary to authorize or constitute corporate action, the consent in writing to such corporate action of all of the shareholders, and/or all the shareholders of a class or classes of shareholders, having voting power on such particular question, shall be sufficient for such purpose, without necessity for a meeting of such shareholders, or class or classes of shareholders.

EXHIBIT "F".

Section 62 of Act No. 250 of the Louisiana Legislature of 1928.

Section 62: Order or Certificate of Dissolution; Filing same.

I. When a corporation has been completely wound up, the court, if the proceeding is subject to the supervision of the Court, shall make an order declaring the corporation to be dissolved; and if the proceeding is out of court, the liquidator or liquidators shall sign and acknowledge a certificate stating that the corporation has been completely wound up and is dissolved.

II. Said order or certificate of dissolution shall be delivered to the Secretary of State, who shall file the same in his office, and thereupon the corporate existence shall terminate, and the Secretary of State shall issue a certificate of dissolution, which shall forthwith be filed for record in the office of the Recorder of Mortgages in the parish in which the corporation has its last registered office.

III. Any assets inadvertently or otherwise omitted from the winding up shall vest in the liquidator or liquidators, for the benefit of the persons who would have been entitled thereto if they had been in their hands before the dissolution of the corporation, and on realization shall be distributed accordingly.

IN THE

Supreme Court of the United States

October Term, 1943.

No. 436

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR,

Petitioner,

versus

JAMES V. REUTER, INC.,

Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF FOR THE RESPONDENT.

FRANK S. NORMANN,
Attorney for James V. Reuter Co., Inc., prior to dissolution.

NORMANN & ROUCHELL, and
CARLOS E. LAZARUS,
1605 Hibernia Bank Building,
New Orleans, La.,
Of Counsel.

INDEX.

CITATIONS.

CITATIONS—(Continued)

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BRIEF FOR THE RESPONDENT.

PREFACE.

As will appear from the record, counsel for respondent has filed with this court a "Motion to Recall the Writ of Certiorari" issued herein, on the ground that the respon-

dent, a Louisiana Corporation, has been dissolved as provided by the laws of the State of Louisiana, and no judgment that this court could render could be carried into effect. Counsel is plainly perplexed as to his duty as a Member of the Bar of this Honorable Court under the exigencies presented in this case. If the motion to recall the writ of certiorari is granted, the necessity for this brief and counsel's appearance for argument is unnecessary. *Contra,* if the motion is denied, counsel occupies the position of representing a corporation whose legal existence has been terminated, with no reservation in the dissolution proceeding or provided by the laws of the State of Louisiana, to continue with this litigation. Therefore, counsel has concluded to present this brief and appear in argument in the conscientious recognition of his obligation to his non-existent former client, who discharged the expense therefor prior to dissolution, subject to the pleasure of the court.

QUESTIONS PRESENTED.

1. Did the intrastate selling and delivery by a local wholesale produce merchant to local ship chandlers of "fresh" vegetables, fruits and produce to provision boats for the consumption of the crews of such vessels, subject the employees of the wholesale produce merchant to the provisions of the Fair Labor Standards Act, as being "engaged in commerce".

2. Were the employees of a wholesale produce merchant engaged, as a matter of law, in the "production of

goods for commerce" within the meaning of the Fair Labor Standards Act, whose duties were to unload, uncrate, examine, sort, select and repackage fresh fruit, vegetables and produce, the orders for which are made up from stock on hand, approximately fifty percent of which is purchased from out of state sources.

3. Were the employees of a wholesale produce merchant who purchased approximately 50% of its fresh fruit, vegetables and produce from out of state sources for delivery to its switch track in refrigerated cars which were used as temporary night storage space for produce that may have been on hand at the end of the day, engaged "in commerce" within the meaning of the Statute, because they unloaded and hauled such produce to the merchant's place of business in preparation of orders for delivery to the merchant's customers.

4. Where the findings of fact of the District Court negatived rather than supported the contention that the employees of a wholesale produce merchant spent a substantial portion of their time "in commerce" or in the "production of goods for commerce" a Circuit Court is authorized to draw its own conclusions therefrom.

STATEMENT.

This suit was brought by the Administrator of the Wage and Hour Division on January 23rd, 1942, to en-

join the Reuter Company, a Louisiana Corporation, (now dissolved), from violating certain provisions of the Fair Labor Standards Act. (R. 1-5.)

The facts as found by the District Court are as follows: The Reuter Company was engaged in purchasing, selling and distributing fresh fruits and vegetables, and employed from 10 to 15 employees, including office help, warehousemen and truckdrivers. (R. 18.) Approximately 50% of the produce sold by the Reuter Company was purchased from out of state sources. This produce arrived in refrigerated railroad cars which averaged from 12 to 20 cars per month, and were switched to a siding known as "REUTER SWITCH". (R. 18-19.) **The Reuter Company used these cars from two to five days as temporary night storage for produce on hand at the end of the day. (R. 20,) All the vegetables arriving from other states were unloaded from the freight cars and brought to the Reuter's place of business to be uncrated, unpacked and examined and to make up orders from stock on hand** for delivery to intrastate customers, including an average of twelve orders a day for shipment to out-of-state customers via the Railway Express whose trucks came to the Reuter's place of business each day and the out-of-state orders loaded thereon by Reuter's employees. (R. 19.) Because of their perishable nature, there was a very rapid turnover of the produce. (R. 20.)

Only 5% of the total yearly sales were made to out-of-state customers. (R. 19.) The warehouse employees sorted, selected, repackaged and handled the produce, without distinction as to its ultimate destination, orders

being made from stock on hand. (R. 19.) The Reuter Company sold produce to local ship chandlers who purchased same to provision boats for oceangoing voyages. (R. 19.) The bulk of the produce purchased by the local ship chandlers was picked up by them in their own trucks at the Reuter's place of business. (R. 19.) Occasionally, however, Reuter's truck drivers delivered some of this produce to the docks. (R. 19.)

The District Court found the hours worked by the warehousemen and truck drivers ranged from 55 to 75 hours per week (R. 20), but the truck drivers spent not more than 1½ hours a day in unloading produce from the freight cars and hauling it to Reuter's place of business. (R. 20.)

The District Court held (1) because of the rapidity in turnover of produce received from out-of-state sources due to their perishable nature and Reuter's method of handling them, there was a continuity of movement to Reuter's customers, whether local or distant, and all employees of the company were an integral part of that movement and engaged "in commerce" within the meaning of the Act. (R. 20, 21-22); (2) that employees who sorted, picked over, handled, packaged, and repackaged produce in Reuter's place of business without regard to the final destination thereof, part of said goods being regularly shipped to out-of-state customers in the normal course of business, were producing goods for commerce within the meaning of the Act. (R. 21); that the employees who prepared and shipped orders to out-of-state

customers and those who prepared and delivered orders to ship chandlers for provisioning of vessels on their voyages were engaged in commerce within the meaning of the Act. (R. 21.)

The Circuit Court of Appeals reversed and remanded the case on the grounds that (1) the lower court erred in ruling that the produce had not come to rest at Reuter's premises (R. 31, 32); (2) that employees who delivered goods to ship chandlers and to ships for the provisioning of the crew were not engaged in commerce within the meaning of the Act (R. 30-31); (3) that in the absence of a showing that a substantial portion of the time of Reuter's employees were spent in interstate activities, the fact that 5% of the total sales of defendant are made to out-of-state customers, is insufficient to establish they were within the provisions of the Act (R. 32, 33); (4) that the lower court erred in holding that the sorting, repackaging and handling of goods constituted production of goods for commerce within the meaning of the Act. (R. 30.)

SUMMARY OF ARGUMENT.

I.

In the brief of the petitioner, on the question of vegetables and produce sold and delivered to ship chandlers, it is stated, "it seems unlikely that the Circuit Court of Appeals seriously questioned the interstate character of

these transactions. Certainly it is too late to deny that the business of selling merchandise within a State for transportation beyond the State is interstate commerce".

The writer of this brief most certainly believes the Circuit Court of Appeals seriously questioned the interstate character of these transactions, both from the factual issues before the court as well as the applicable law.

To answer the assumption of the petitioner's argument, as quoted above, requires a two-fold analysis. If the petitioner is referring to their contention of the alleged continuity of movement of these fresh vegetables, we believe a study of the findings of fact belie the interstate character of these transactions. The District Court found as a fact that vegetables and produce were sold to ship chandlers, who purchased this produce without specifically advising Reuter of the destination and proposed use thereof, the bulk of which was picked up by the ship chandlers in their own trucks at the Reuter's place of business, save on occasions Reuter's trucks delivered orders for boats docked in the New Orleans Harbor. (R. 19.) In the finding of fact, it is stated that orders are made up **from stock on hand** (R. 19), and since it is shown that only 50% of the fresh vegetables and produce which were sold by Reuter were received from out-of-State sources, to hold that these particular sales were comprised of the out-of-State shipments exclusively would require resort to conjecture. But conceding, without admitting, that the particular sales were comprised exclusively of vegetables received from out-of-State sources, to hold they assumed an interstate character because of that fact alone, would require the court to ignore the

coming to rest doctrine urged in Part III of this brief, and the further fact that the District Court found as a fact that these sales were made to the ship chandlers themselves as local transactions, who in the majority of cases picked up their purchases in their own trucks at Reuter's place of business (R. 19), and the Reuter Company was not specifically advised by the purchasers of the destination and proposed use thereof. (R. 20.) True, the Circuit Court of Appeals, in their opinion reversing the District Court, discusses the question of goods after delivery to ultimate consumer as being excluded and hence not in commerce. But we believe a careful study of the opinion by the Circuit Court of Appeals will show its author was of the opinion and intended to hold that goods sold to ship chandlers, who picked up their purchases at Reuter's place of business without specifically advising Reuter of the destination and proposed use thereof, as well as produce delivered by Reuter to docks to provision vessels, were not sold, shipped or delivered in "interstate commerce". As to those sold to ship chandlers without any knowledge on the part of Reuter as to their destination and proposed use, we fail to see in what respect they different from any other local transaction. The record shows this produce was to provision vessels for oceangoing voyages, which can hardly mean other than the consumption of the crew. If the contention of the petitioner is sustained, then any corner grocer who sells a box of cakes to a customer who consumes the cakes beyond the border of the State in which the purchase is made, subjects the grocer to the provisions of the Act. We do not believe Congress had any such intention. Would the sale of gasoline to a motorist,

who, without any knowledge of its intended use or destination by the vendor, subject the seller thereof to the Act as being in interstate commerce, because the purchaser drove across a state line before its complete consumption? We think not.

Again, with regard to the employees preparing for and delivering produce to the docks, destined for the consumption of crews of vessels, counsel for the petitioner contends such delivery constitutes "production" of goods for commerce, because although delivery was made to the ultimate consumer, Section 3 (i) of the Act which defines "goods", exempts such delivery only after the goods have been withdrawn from commerce. The fallacy of this argument, as already exemplified in the brief in opposition to the application for writs, consists in that counsel assumes the very point to be established, namely, that the produce was still "in commerce" and that the employees were engaged in "production of goods for commerce".

The cases relied on by counsel for the petitioner, namely, *Hamlet Ice Co. v. Fleming*, 127 F. (2d) 165 (C. C. A. 4) and *Chapman v. Home Ice Company*, 136 F. (2d) 353, (C. C. A. 6), are not apposite to the present case for there the question involved was whether employees employed in the "production" of ice for icing refrigerator cars were engaged in production of goods for commerce. In those cases it was held that Section 3 (i) of the Act did not relieve the **producers** of goods intended for shipment in Interstate Commerce. But here neither Reuter nor its employees "produced" anything and consequently Section 3 (i) has no application whatever.

In *Fleming v. Kenton Loose Leaf Tobacco Warehouse Co.*, 41 F. Supp. 225, also relied upon by petitioner in support of his contention that the employees were engaged in producing goods for commerce because they **handled** the produce of Reuter, the court did say that a warehouseman whose sole function was to lend its agencies to growers of tobacco for the sale of the tobacco in interstate commerce was a "producer". It is submitted however, that the decision rested primarily on the fact that the defendant and its employees were engaged "in commerce" and that the language relied on by counsel was *obiter dictum*. At any rate the *Kenton* case is distinguishable from the present case in that tobacco is susceptible of manufacture and the **"handling"** there involved could be said to be an occupation necessary to such manufacture.[1]

The Reuter Company was not engaged in the production or manufacture of any articles. How then can it be said its employees were so engaged?

This Court has repeatedly held that in enacting the Fair Labor Standards Act, Congress did not choose to exert its power to regulate commerce to the fullest extent but that the legislation was intended to apply to those persons actually engaged in commerce and not to those engaged in activities merely affecting commerce.[2] Thus in *McLeod v. Threlkeld*, which is the last expression of this Court

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[1] Cf. Calaf v. Gonzalez, 127 F. (2d) 934 wherein it was held that employees engaged in the transportation and handling of sugar cane were engaged in "production" because the farming and sale thereof were incidental and necessary to the *production of sugar*.

[2] Kirschbaum v. Walling, 316 U. S. 517, 62 S. Ct. 1116, 86 L. Ed. 1638; Walling v. Jacksonville Paper Company, 317 U. S. 564, 63 S. Ct. 333, 87 L. Ed. 393; McLeod v. Threlkeld, 319 U. S. 491, 63 S. Ct. 1248.

on this subject, it was held that a cook, furnishing meals to a gang of maintenance-of-way employees of a railroad company, was not engaged in commerce within the contemplation of the Act. It must be noted that the car in which the meals were served was actually running on the railroad's tracks and followed the workmen to the scene of their activities. Yet the Court did not find that the cook was so intimately connected with interstate commerce as to be, in contemplation of law a part of it.

In view of this decision can it be consistently held that Reuter's employees who merely packed and generally prepared produce for delivery to ship chandlers, without regard to its final destination and proposed use, are so closely related to the transportation thereof in interstate commerce, simply because the crews of the vessels might not consume all this produce until the vessel ultimately reaches a foreign destination? We think not.

II.

That the Fair Labor Standards Act by its own terms is limited in its application to persons engaged in interstate commerce or in the production of goods for commerce and that it does not extend to activities which merely affect commerce, is now firmly established, as is the principle that the applicability of the Act depends upon the character of the employees' work rather than that of the employer.[3]

[3] Kirschbaum v. Walling, 316 U. S. 517, 62 S. Ct. 1116, 86 L. Ed. 1638; Walling v. Jacksonville Paper Company, 317 U. S. 564, 63 S. Ct. 332, 87 L. Ed. 393.

Section 3 (j) of the Fair Labor Standards Act defines production as the "producing, manufacturing, mining, handling, transporting or in any other manner working on such goods or in any other process or occupation necessary to the production thereof".[4]

The words "production of goods" have a well defined meaning in the law. Production or manufacture is a transformation of raw materials into a change of form for use. Commerce, on the other hand, consists in the purchasing, selling and exchanging of commodities and the transportation incidental thereto.[5]

That a person may be engaged "in commerce" and yet not engaged in the "production of goods for commerce" within the intendment of the Act, is also beyond controversy.[6] The decision of the District Court, and applicant's contention in this court, is that the employees who sorted, selected, packaged and "handled" the Reuter Company's produce, in the preparation thereof for distribution and sale to customers, and particularly those engaged in the preparation of packages for sale to local ship chandlers were engaged in the "production of goods for commerce" within the meaning of the Act. It needs no citation of authority to show that whatever these employees were doing, they were not engaged in the pro-

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[4] 29 U. S. C. A. Sec. 203 (j).

[5] Kidd v. Pearson, 128 U. S. 1, 9 S. Ct. 6, 32 L. Ed. 346; Carter Coal Co., 298 U. S. 238, 50 S. Ct. 855, 80 L. Ed. 1160; Utah Power and Light Co. v. Pfost, 52 F. (2d) 226.

[6] Kirschbaum v. Walling, supra; Johnson v. Dallas Downtown Development Co., 132 F. (2d) 287 (C. C. A. 5th); In re: Liquidation of New York Title & Mtg. Co., 39 N. Y. S. (2d) 893, 6 Labor Cases, p. 64213, Sec. 61,441; Cochran v. Florida National Building, 45 F. Supp. 830, 134 F. (2d) 615.

duction of goods; they were not engaged in changing the form of the produce to convert it into an entirely new article. True, this Court has held that the "handling" of goods constitutes production, **but then only when such handling is in aid or necessary to the production of a manufactured article.**[7] The work being done here was in aid of distribution, which is part of commerce, and in this instance of intrastate commerce, and by no stretch of imagination could be said to be in aid of production. **The very limitation in the Act indicates that it is only such handling or transportation as is necessary for the production of goods,** that will constitute "production" within the meaning thereof.[8]

III.

It is necessary to take issue with the petitioner's recital of the factual issues as found in the third part of the argument on the question of the continuity of movement and coming to rest doctrine. On page 22 of petitioner's brief, it is stated: "Respondent's out-of-state purchases of fruits and vegetables are shipped in refrigerated freight cars which are shunted to respondent's siding. (R. 18-19.) From here, that part of the produce which is **immediately** unloaded is brought to respondent's premises, one block away, where it is examined, sorted, selected, packaged, and handled, without distinction as to its ultimate destination. (R. 19.) The bulk of the produce is then rapidly sold and delivered to respondent's customers, who com-

[7] Cf. Kirschbaum v. Walling, supra.

[8] 29 U. S. C. A. Sec. 203 (j) ". . . handling, transportation or in any other manner working on such goods, or in any process or occupation *necessary to the production thereof.*"

prise both local and out-of-State wholesalers and retailers, as well as ship chandlers (R. 10-20). The refrigerated freight cars in which goods are received are used as temporary overnight storage place for produce not sold at the end of the first day (R. 20.)"

Because the subject of this controversy involves the handling of fresh vegetables, a highly perishable product, in an abundance of caution, we call the court's attention to the fact there is nothing in the findings of fact to show any **immediate** unloading of only a **part** of the produce which was brought to the Reuter's premises for examination, sorting, selecting, packaging and handling, without distinction as to its ultimate destination. The findings of fact as disclosed by the record reads:

> (R. 19): All of the vegetables and produce arriving from out-of-State sources are unloaded from the freight cars and brought to defendant's place of business to be uncrated and examined before being sold.
>
> (R. 20): * * * In general, all goods received from out-of-State sources are unloaded, examined, sorted, repackaged, sold and delivered within one to five days after they are acquired by defendant. * * *

We quote the foregoing for comparison with the verbiage used in petitioner's brief, to avoid any impression on the part of the court that only a portion of the produce was unloaded and brought to Reuter's premises, whereas the record shows that all the produce was unloaded and brought to the Reuter's premises.

But more important from the foregoing quotations is the fact that the District Court found **all** the vegetables and produce arriving from out-of-State sources after being unloaded from the freight cars and brought to Reuter's place of business, was **uncrated** and examined before being sold. (R. 19.) The court further found as a fact that "Orders are made up from stock on hand, etc.", (R. 19) which clearly shows a commingling with other vegetables and produce on hand and certainly establishes, without a doubt, these out-of-State shipments came to rest when placed on Reuter's premises, should the court reject our theory that they likewise came to rest when placed on Reuter's switch under the peculiar circumstances disclosed in this case.

Nor can the writer subscribe to the statement found in the petitioner's brief that the "bulk of the produce is then rapidly sold, etc.", (p. 23 of petitioner's brief). Here, again, the court must bear in mind we are dealing with fresh vegetables. The District Court found the out-of-State produce was sold and delivered within one to five days after acquired by Reuter. (R.20.) We fail to find any statement in the findings of fact that there is a rapid selling of the bulk of this produce. Vegetables decay according to their character.

The uncrating of this produce at Reuter's place of business is indicative of the fact that it was taken out of its original packages, which could only be accomplished after the produce had come to rest in the state, void of any federal control thereof. The case of *Swift and Co. v. United States*, 196 U. S. 375, 25 S. Ct. 276, advanced by

the petitioner is not in point. Read the findings of fact by the District Court as one may, the conclusion is inescapable that this produce had come to rest within the state and was held there at the pleasure of the Reuter Company as owner for disposal either within or without the state and became a part of the general mass of Reuter's property within the state. In *State of Minnesota v. Blasius*, 54 S. Ct. 34,290 U. S. 1, 78 L. Ed. 131, this court said:

> (54 S. Ct. 37): "Where property has come to rest within a state, being held there at the pleasure of the owner, for disposal or use, so that he may dispose of it either within the state, or for shipment elsewhere, as his interest dictates, it is deemed to be a part of the general mass of property within the state and is thus subject to its taxing power."[9]

A tomato, unlike a potato, will spoil immediately. Holding a tomato five days would not be a rapid turnover. The same may be said of possibly all fresh vegetables. What the petitioner has failed to comprehend is that rapidity of movement must be understood in relation to the particular product under discussion. What may be a rapid movement in one case, may be entirely

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[9] Champlain Co. v. Brattleboro, 260 U. S. 376, 43 S. Ct. 146, 149, 67 L. Ed. 309, 25 A. L. R. 1195, the coal in Brown v. Houston "was being held for sale to any one who might wish to buy."

Brown v. Houston, 114 U. S. 622, 5 S. Ct. 1091, 1096, 29 L. Ed. 257, coal mined in Pennsylvania and sent by water to New Orleans to be sold there in the open market was held to have "come to its place of rest, for final disposal or use", and to be "a commodity in the market of New Orleans", and thus to be subject to taxation under the general laws of the state; although the property might, after arrival, be sold from the vessel on which the transportation was made for the purpose of shipment to a foreign port.

Pittsburgh & Southern Coal Co. v. Bates, 156 U. S. 577, 15 S. Ct. 415, 39 L. Ed. 538.

inapplicable in another because of the very nature of the product.[10]

Further, on page 23 of the petitioner's brief, we find the following: "The refrigerated freight cars in which goods are received are used as a temporary over-night storage place for produce not sold at the end of the first day." (R. 20.)

In the findings of fact the District Court states:

> (R. 20): "This rapidity of movement is exemplified by defendant's custom of using the refrigerated freight cars in which goods are received as a temporary night storage place for produce that may be on hand at the end of the day."

The verbiage quoted from the petitioner's brief "at the end of the first day", may lead the court to believe that only the produce received from out-of-State sources in any particular car is permited to remain in these refrigerated cars as temporary overnight storage. In fact the reference to the immediate unloading of only a part of the produce, as found on page 22 of the petitioner's brief, supports this thought. However, as will be gleaned from the quoted portion of the District Court's findings of fact, these refrigerated cars were used as temporary storage place for the produce that Reuter had on hand at the end of the day.

The Reuter Company had no warehousing facilities, but used the refrigerated cars for such purposes. (R. 20.)

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[10] The Circuit Court of Appeals noted, for example, "They may not come to rest as long as an axe handle might on the shelf of a hardware merchant," etc. (R. 32.)

It is not inconsistent to hold, therefore, that the interstate character of the shipments terminated upon delivery by the carrier at Reuter's switch, and that any subsequent movement of the produce was purely local in character.

It is submitted therefore that when the produce purchased by Reuter from out of the State, came to rest when delivered to its railroad siding, that thereupon the interstate character of the shipments terminated and that the subsequent unloading, and hauling of the produce to the Reuter Company's premises was a movement purely intrastate.

Interstate Commerce begins and the regulatory power of Congress attaches only when goods commence their transportation interstate and terminates when the transportation is completed.[11]

And the ultimate test to determine whether interstate commerce has terminated is whether the goods have come to rest in the State of importation, or whether there is such a continuity of movement, that the interstate character of the transportation cannot be said to have terminated.[12] As was said by this court in the *Schechter* case,

> (55 S. Ct. 849): "The mere fact that there may be a constant flow of commodities into a state does not mean that the flow continues after the property has arrived and has become commingled with the mass of

[11] Atlantic Coast Line Co. v. Standard Oil Co., 275 U. S. 257, 48 S. Ct. 107, 72 L. Ed. 770; Chicago M. & St. Paul Ry. Co. v. Iowa, 233 U. S. 334, 34 S. Ct. 592, 56 L. Ed. 988; Schechter Poultry Corporation v. United States, 295 U. S. 495, 55 S. Ct. 837, 79 L. Ed. 1570; Carter v. Carter Coal Co., 298 U. S. 238, 56 S. Ct. 855, 80 L. Ed. 1160.

[12] Walling v. Jacksonville Paper Co., supra; Higgins v. Carr Brothers Co., 317 U. S. 572, 63 S. Ct. 337.

property within the state and is there held solely for local disposition and use."

In interpreting the Fair Labor Standards Act, it has been definitely established that the mere fact that a concern makes interstate purchases does not make it subject to the act, even though it makes such purchases in anticipation of future demands, but that there must be shown in addition, a continuity of movement to the ultimate consumer.[13] Reuter purchased some of its produce from out of state sources and had it delivered at its switch track. Reuter had no prior commitments, understandings or agreements with any one customer to whom the produce was to be sold. There were no prior contracts or prior orders to be filled. There is no question but that the produce purchased was Reuter's and that it remained its property until sold in the course of business.

In *Jewel Tea Company v. Williams*[14] it was held that the interstate character of shipments terminated when the merchandise was delivered to the importer's warehouse. Similarly, in *Gerdert v. Certified Poultry and Egg Co.*[15] it was held the interstate character of shipments terminated upon delivery by the common carrier to the employees of the importer.

Interstate commerce does not begin until the merchandise is actually committed to a common carrier for shipment interstate.[16] The preparation of articles for ship-

[13] Walling v Jacksonville Paper Co., supra; Higgins v. Carr Bros. Co., supra; Jax Beer Co. v. Redfern, 124 F. (2d) 172.

[14] Jewel Tea Co. v. Williams, et al., 118 F. (2d) 202.

[15] Gerdert, et al. v. Certified Poultry & Egg Co., Inc., et al., 38 F. Supp. 964.

[16] Coe v. Errol, 116 U. S. 517, 6 S. Ct. 475, 29 L. Ed. 715; Pennsylvania R. R. Co. v. Knight, 192 U. S. 21, 24 S. Ct. 202, 48 L. Ed. 325; Heisler v. Thomas Colliery Co., 260 U. S. 245, 43 S. Ct. 83, 67 L. Ed. 237; Carter v. Carter Coal Co., supra; In re: Greene, 52 F. 104.

ment is nothing more than an authority affecting transportation. Whether it constitutes "commerce" within the meaning of the act is the question which this court must decide, in the light of past jurisprudence and the recent interpretation of the statute here involved.

Section 3 (b) of the Act defines commerce as meaning:

> "* * * trade, commerce, transportation, transmission or communication among the several states * * *"[17]

This definition does not include the handling or packing of goods for trade, and to say it does would be to place a strained construction on the statute which would render the statute unconstitutional since the regulation of Congress attaches **only when the goods are committed to the carrier for transportation from one state to another.** *Coe v. Errol*, 116 U. S. 517, 6 S. Ct. 475, 479, where this court said:

> "It is true, it was said in the case of The Daniel Ball, 10 Wall. 565: 'Whenever a commodity has begun to move as an article of trade from one state to another, commerce in that commodity between the States has commenced.' But this movement does not begin until the articles have been shipped or started for transportation from one state to another. **The carrying of them in carts or other vehicles or even floating them, to the depot where the journey is to commence,** is no part of that journey. That is all preliminary work, performed for the purpose of putting the property in a state of preparation and readiness for transportation. Until actually launched on its

[17] 29 U. S. C. A. Sec. 203 (b).

way to another state or committed to a common carrier for transportation to such state, its destination is not fixed and certain * * *."

It is true Congress has the right to regulate commerce as well as any activity affecting commerce. But as has been repeatedly held by this Court, Congress did not choose to exercise this power to the fullest extent in enacting the Fair Labor Standards Act, and did not choose to regulate transactions which merely affected commerce. The preparation of articles for shipment even to other states is not commerce; it might be a transaction affecting such commerce, but this, Congress did not intend to regulate. It follows therefore that respondent's employees are not protected by the Act and that respondent is not subject to regulation under it.

But granting, *arguendo*, that respondent's employees were engaged in a commercial activity within the meaning of the Act, there is no showing that a substantial portion of their time was spent in such activity, and in the absence of such a showing, the court *a qua* was not authorized to issue the injunction. Fully 95% of respondent's produce was packed and prepared for sale to local customers. Only about 5% was sold to out-of-State customers. The packers prepared the packages indiscriminately, and there is nothing in the record of the amount of time they spent in preparing shipments to out of the State. In the absence of such a showing, it is impossible to say what portion of their time was spent in this activity or whether it was substantial enough to warrant the issuance of the injunction, and where there is a com-

plete failure to prove how much of the work done is interstate and how much intrastate, the court is powerless to determine the question.[18]

The most that can be said from the findings of fact by the District Court is that the hours worked by warehousemen, carmen and truckdrivers ranged from 55 to 75 hours a week. (R. 20.) As stated heretofore, of the total business done by the Reuter Company, only an average of 5% was for out of town customers, and these orders were picked up by the Railway Express at the Reuter's premises. This 5% consisted of approximately twelve orders a day. (R. 19.) In relation to the total sales as shown on page 19 of the Transcript of Record, the out-of-town business was negligible. The District Court further found that truck drivers usually spent one and one-half hours a day, sometimes longer, in unloading freight cars and hauling the produce to defendant's place of business. (R. 19.) This represents an average of 9 hours a week out of a total of 55 to 75 hours, and certainly could not be said to represent a substantial portion of the employee's daily or weekly time. Hence we urge that the conclusion of law by the District Court is not supported by the findings of fact. Nor are the authorities of the petitioner on the question of commingling of interstate and intrastate business applicable to the facts in this case. The District Court determined and there is no dispute over the

[18] Super Cold South West Co. v. McBride, 124 F. (2d) 90; White Motor Co. v. Littleton, 124 F. (2d) 92; Jax Beer Co. v. Redfern, 124 F. (2d(1722.

fact that only 5% of Reuter's business was for out-of-State sources. (R. 19.) The record further shows the number of hours certain employees worked (R. 20), and the proportion of their time apportioned to interstate business (R. 19), should this court disagree with the contention urged in this brief. Having removed the uncertainty of the number of hours worked per week and the average hours devoted to the alleged interstate business, it was incumbent upon the District Court in compliance with the plain dictates of the statute to determine which of Reuter's employees spent a substantial portion of their time on interstate business, in the absence of which the issuance of a blanket injunction is unauthorized.

In answer to the contention of the petitioner that the District Court erred when it characterized its ruling as a conclusion of law (page 26 of petitioner's brief), we believe it is now an axiomatic rule of law, that where there is no controversy as to the factual issue, the ultimate conclusion is a question of law, or at least a mixed question of law and fact which may be reviewed by an appellate court. *United States v. Walter Pugh*, 99 U. S. 265, 25 L. Ed. 322; *Helvering v. Rankin*, 295 U. S. 123, 55 S. Ct. 732, 79 L. Ed. 1343; *Helvering v. Tex-Penn Oil Co.*, 309 U. S. 418, 57 S. Ct. 569, 81 L. Ed. 755.

CONCLUSION.

It is submitted, therefore, that the injunction was improvidently issued and that the case should be reversed and remanded with directions that it be dismissed.

Respectfully submitted,

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FILE COPY

IN THE

Supreme Court of the United States

October Term, 1943.

No. 436

L. METCALFE WALLING, Administrator of the Wage and Hour Division, United States Department of Labor,

Petitioner,

versus

JAMES V. REUTER, INC.,

Respondent.

REPLY BRIEF ON MOTION TO RECALL WRIT OF CERTIORARI.

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REPLY BRIEF ON MOTION TO RECALL WRIT OF CERTIORARI.

The response by the petitioner to the motion to recall the writ of certiorari was received too late to formally reply thereto prior to action taken by this Court on February 28th.

I.

The response of the petitioner endeavors to create the impression that a dissolved corporation still exists for certain purposes under the law of Louisiana. The Reuter

Company was a private corporation which was organized and existed by virtue of Louisiana's Business Corporation Act, No. 250 of 1928, as amended. Whether its dissolution put an end to its existence, like that of the death of a natural person, or its life prolonged for the purposes of litigation, must be determined from the statute creating it. The redactors of the statute under discussion made no provision whatsoever for the prolongation of the life of a corporation, even for the purposes of litigation, subsequent to its liquidation and evidence of its dissolution by the issuance of a certificate to that effect by the Secretary of State of the State of Louisiana.

In the certificate of the Assistant Secretary of State, a photostatic copy of which has been filed with this court, the essential requirements of the Louisiana Statute as to proof of publication of notice of dissolution and the certificate of the liquidator showing that the affairs of the corporation had been completely wound up and dissolved, is acknowledged as being in compliance with the statute justifying the issuance of the certificate of dissolution,— **"and the corporation stands dissolved".**

The response of the petitioner would have this court to ignore its oft repeated decisions **to the effect that a private corporation can exist only under the express law of the state or sovereignty by which it was created, and its dissolution puts an end to its existence, the result of which may be likened to the death of a natural person, and there must be some statutory authority for the prolongation of its life even for litigation purposes.** The most recent case of this court sustaining this doctrine is

Chicago Title & Trust Co. v. Forty-one Thirty-six Wilcox Bldg. Corporation, 302 U. S. 120, 58 S. Ct. 125, 82 L. Ed. 147. Cf. *Oklahoma Gas Co. v. Oklahoma*, 273 U. S. 257, 47 S. Ct. 391, 71 L. Ed. 634; *First National Bank v. Colby*, 21 Wall. 609, 615, 22 L. Ed. 687; *Oregon Railway Co. v. Oregonian Ry. Co.*, 130 U. S. 1; 20, 9 S. Ct. 409, 32 L. Ed. 837. The error into which the respondent to the motion to recall has fallen, is the failure to distinguish the status of a Louisiana corporation while in the process of liquidation and one that has been dissolved. This is so patent from the brief filed in opposition to the motion to recall, that we quote therefrom. On page '5' of the brief, we find the statement:

> "Under the Louisiana corporation law respondent no longer exists, even for purposes of suit."

That is exactly the contention of the mover to recall and the writer doubts if he could have stated the subject more clearly. On the following page, No. 6, it is contended, should the judgment of the Circuit Court of Appeals be reversed, it "would bind Reuter individually, while he is carrying on the business, * * *." Throughout the brief, it is contended that Reuter is carrying on the business of the dissolved corporation in a capacity likened to that of a liquidator. That such is not the case is not only supported by the affidavit of Mr. Reuter, but is also evidenced by the certificate of the Assistant Secretary of State, who certifies to the world that the former corporation has complied with the law of Louisiana relative to the dissolution of corporations **and that the corporation stands dissolved.**

II.

But counsel contends that the certificate of dissolution in the present case was improperly issued by virtue of the interpretation of the Louisiana Business Corporation Act by the Supreme Court of Louisiana in the case of *McCoy v. State Line Oil and Gas Co.*, 180 La. 579, 585, 157 So. 116, 118, and that it was incumbent upon the liquidator of the Reuter corporation to defend the litigation presently before this court. That such was not the holding of the Supreme Court of Louisiana can be gleaned from a mere reading thereof. The cited case is authority for the doctrine **that a certificate of dissolution issued by the Secretary of State, pursuant to the provisions of Section 62 of Act 250 of 1928, terminates the legal existence of the affected corporation and the tenure of office of its liquidator, and no litigation can thereafter be conducted against that corporation, or its representative, unless the certificate is annulled.** As held by the court:

> (P. 583): "The suit was met by a plea in abatement or in bar, resting on the ground that defendant—a corporation—had been dissolved and had ceased to exist. In a supplemental petition, plaintiff prayed that the certificate of dissolution, issued by the Secretary of State, under section 62 of Act No. 250 of 1928, be canceled and annulled. **It is the plea in bar and the demand for the cancellation of the certificate of the Secretary of State that the court has presently before it.**
>
> **"Unless the certificate of the Secretary of State is annulled, the litigation against the corporation is ended, for the effect of the certificate is to destroy**

the corporation by putting it completely out of existence. In other words, unless the certificate be annulled, the corporation would remain dead."

To the same effect is the holding by the Court of Appeal of the State of Louisiana, Second Circuit, in the case of *Ortego, et al. v. Nehi Bottling Works, et al.*, 182 So. 365, 367.

It has been the law of the State of Louisiana, since the decision in the case of *Musson v. Richardson*, 11 Rob. 37, decided in 1845, that the dissolution of a corporation ends its legal existence, and no valid judgment can thereafter be rendered against it. Cf. *Putman & Norman, Inc. v. Levee*, 160 So. 155.

In the case of *Pelican Oil & Gasoline Co., Inc., et al., v. Commissioner of Internal Revenue*, 128 F. (2d) 561, an attempt was made by a dissolved corporation for a redetermination of its tax liability before the Board of Tax Appeals. On the ground that the company had been previously dissolved, the petition was dismissed. Reviewing the conditions under which a corporation may be dissolved under the laws of the State of Louisiana, and although the court comments upon the fact that the corporation was dissolved the same day that the liquidator was appointed, it was held:

> (P. 562): "On the narrow question presented, we are constrained to hold that this liquidator, under the law of his appointment, can no longer litigate for the corporation which he wound up and dissolved."

As the writer understands the Business Corporation Law of this State, there is no extension of the liquidator's functions subsequent to the dissolution of a corporation, except as provided in Section 62, paragraph 111, wherein it is provided that any assets omitted from the winding up shall vest in the liquidator or liquidators for the benefit of those who would have been entitled thereto if they had been in their hands prior to the dissolution.

III.

In the case of *Chicago T. & T. Co. v. Forty-One Thirty-Six W. Bldg. Corp., supra,* this court held:

> "How long and upon what terms a state-created corporation may continue to exist is a matter exclusively of state power. Horn Silver Mining Co. v. New York, 143 U. S. 305, 312, 313, 12 S. Ct. 403, 36 L. Ed. 164; Ashley v. Ryan, 153 U. S. 436, 441, 443, 14 S. Ct. 865, 38 L. Ed. 773; New Jersey v. Anderson, 203 U. S. 483, 493, 27 S. Ct. 137, 51 L. Ed. 284. The circumstances under which the power shall be exercised and the extent to which it shall be carried are matters of state policy, to be decided by the state legislature. There is nothing in the Federal Constitution which operates to restrain a state from terminating absolutely and unconditionally the existence of a state-created corporation, if that be authorized by the statute under which the corporation has been organized. And it hardly will be claimed that the federal government may breathe life into a corporate entity thus put to death by the state in the lawful exercise of its sovereign authority."

And in the cited case this court held that the federal government is powerless to resurrect a corporation which the state has put out of existence for all purposes.

Concluding this part of the argument, it is submitted that the action of the state in issuing its certificate of dissolution, has terminated the corporation's life for all purposes, and that under the law of the State of Louisiana, the creator of this corporation and by virtue of whose laws it was dissolved, no valid judgment may be rendered against it in these proceedings and the motion to recall the writ should be granted.

A review of the brief filed by the petitioner in response to the motion to recall, reflects that the authorities advanced in support of the petitioner's contention, are not in point on the question before this court. Counsel cite the case of *Interstate Circuit v. United States*, 306 U. S. 208, 225, 226 (page 8) in connection with the refusal of counsel for the former Reuter Corporation to impart certain information.

The writer's reply thereto is that under the facts disclosed in the motion to recall, the information sought was irrelevant to a decision of the issues presented by the motion to recall. Until such time as the certificate of dissolution is annulled, the litigation against the corporation is ended, and the shareholdings of the respective stockholders is irrelevant.

Most, if not practically all of the cases relied upon by the petitioner, concern themselves with patent infringe-

ment litigation. It will not be the writer's purpose to review them all, but a cursory examination thereof will show they are inapplicable. In *Harvey v. Bettis, et al.*, 35 F. (2d) 349, (page 8 of brief) "Appellant was not a party to the suit, and the injunction ran against him only so long as he was connected with one of the defendants or was acting in aid to or in collusion with one or more of them or for their benefit." *Parker v. United States*, 126 F. (2d) 370, 379, is not in point.

The case of *Bernard v. Frank*, 179 Fed. 516, is so foreign to the issues before the court that we quote from the body of the decision:

> (P. 517): "That it was organized for the purpose of escaping the consequences of the infringement of the patent which Bernard had sold and assigned to the complainants, is too plain for controversy."

In the affidavit of Mr. Alexander E. Ralston, Jr., an associate attorney in the office of Solicitor, United States Department of Labor, annexed to the petitioner's response to the motion to recall, it is stated that he had been informed by Mr. Reuter's counsel that the dissolution of the corporation was had to avoid corporate taxes.

Irrespective of the relevancy of the motive on the part of the shareholders to dissolve the corporation, it cannot be likened to a corporation organized by a defendant who has been enjoined from infringement of a patent, for the sole purpose of escaping the consequences of the injunction, and of which such defendant is an officer. The other authorities cited by petitioner, involving patent cases, are equally inapplicable.

The authorities cited on page 10 of petitioner's brief, of which *Cantrell & Cochrane, Ltd. v. Witteman*, 180 Fed. 794, is characteristic, involve contempt proceedings for violating an injunction in patent infringement cases, and the writer is at a loss to understand their application to the factual issues in this case.

Until such time as this court reverses the Circuit Court of Appeal and reinstates the injunction, assuming the court will not recall its writ and reinstate the injunction, there is no injunction in effect to violate, and therefore the petitioner's authorities are not pertinent.

On page 11 of petitioner's brief the case of *Southport Petroleum Co. v. National Labor Relations Board*, 315 U. S. 100, 62 S. Ct. 452, 86 L. Ed. 718, is unlike the case presently under discussion, because in the cited case the order of the Board not only ran to the petitioner, "**but also to its 'officers, agents, successors, and assigns.'**" Even if the court reinstated the original injunction granted in this case, no such language will be found therein.

In the case of *Iowa Barb Steel Wire Co. v. Southern Barb-Wire Co.*, 30 Fed. 123, the managing officers were made parties defendant to the bill as joint wrong-doers with the corporation.

We are humbly at a loss to understand in what respect a suit by the government under the Sherman Law to dissolve a private association formed by certain railroad companies for their mutual protection by establishing and maintaining reasonable rates, rules and regulations on

certain freight traffic, for which the case of *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 290, 17 S. Ct. 540, 41 L. Ed. 1007, is cited on page 13 of petitioner's brief, has any bearing or relation to the status of a dissolved corporation under a particular state law.

IV.

On page 14 of petitioner's brief, the statement is made that a decision on the merits will not be a nullity, since it will in practical effect at least determine the rights of respondent's employees to recover for past violations under Section 16 (b) of the Act. The petitioner then cites the cases of *Ortego v. Nehi Bottling Works*, 182 So. 365, and *Stock v. E. A. Fabacher, Inc.*, 185 So. 48, both cases originating and decided by the Courts of Appeal for the State of Louisiana. In footnote '6' on page 14, the petitioner contradicts the fear which he entertains in his brief and completely refutes his own argument that a decision in this case is necessary to protect the employees in their alleged claims, because he makes the statement:

> (Footnote 6): "The employee's right to recovery for unpaid wages due under the Act remains in existence against the stockholders of the dissolved corporation."

Nowhere in the affidavit furnished by the petitioner nor in the record before the court is there any evidence or statement of any pending or contemplated employees' claims. The writer of this brief makes the statement, to the knowledge of the atttorneys for the Wage and Hour Division, every employee suit brought against the dis-

solved corporation was either dismissed for lack of proof, prescription or prosecution, without the dissolved corporation being cast for a money judgment in any one of said suits. That the delays for appeal have expired in all cases and that there are no pending or contemplated employee claims.

On pages 15 and 16 of petitioner's brief, cases decided by this court as well as the La. Supreme Court in proceedings involving money judgments in tort and other actions are cited as authority that the death of a natural person does not abate appellate proceedings after a judgment for the plaintiff. The writer of this brief has no quarrel with the cited cases, except they are inapplicable to the case at bar, since there is no money judgment involved in this case.

In an abundance of precaution, we ask the court not to accept the quotation found on page 16 of petitioner's brief as emanating from the case of *Pendleton v. Russell*, 144 U. S. 640, 12 S. Ct. 743, 36 L. Ed. 574, as sustaining the petitioner's contention that the dissolution had not abated the previous appellate proceedings. In fact, this case is authority against the very principle for which it is urged. As the writer understands the case, the judgment purported to be against a dissolved insurance company that had no legal existence at the time. Said the court:

> (12 S. Ct. p. 745): "The judgment was therefore no more valid against a nonexisting corporation than it would have been if rendered for a like amount against a dead man. The receiver was not substituted in the place of the dissolved corporation. No process

or citation was issued by that court to bring him before it, or any proceeding taken for that purpose. *Nor would such a proceeding have any effect, for, the corporation having expired, the suit itself had abated.* It ceased to be a pending suit, etc." (Writer's Italics.)

Likewise, the petitioner quotes the case of *May v. State Bank*, 2 Rob. (Va.) 56, but from which case we quote the following as contradictory to the contention for which it is urged to the court by the petitioner:

(P. 68): "On the other hand an abatement de facto, for matters of abatement after the commencement of the suit, rests on a somewhat different principle. I need only notice the case of the death of the plaintiff or defendant after action brought. In such case the action, though well brought, cannot properly proceed when one of the parties has become extinct. The objection may come from either side, *at any state of the cause*, and need not be pleaded in any shape or form. It is equally incumbent on both sides to give information of the fact to the court. And it is at their peril that those who conduct the demand or the defense take judgment for or against the dead party. To give effect, however, to the abatement it must be declared by the act of the court; for though in the language of the books, the cause is abated de facto, yet the abatement must be judicially pronounced. But whether so pronounced or not, it is equally error to render judgment for or against a dead man. If the death appears upon the face of the record, it is error of law; if it does not so appear, it is error of fact; and in either case the judgment may be reversed by writ of error; in the former, by a writ of error in an appellate court; in the latter by a writ of error coram vobis in the same court.

"Such is the uniform rule of the common law in abatements de facto by the death of a party pending the actions, at any time before final judgment. It applies to all cases whether before or after a decision upon the merits, whether the cause of action does or does not survive to the representative of the deceased party, and whether the death be that of a sole plaintiff or defendant, or one of several joint plaintiffs or defendants." (Writer's Italics.)

CONCLUSION.

In conclusion, it is submitted that the motion to recall the writ of certiorari should, for the reasons herein stated, be granted.

All of which is,

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 436.—October Term, 1943.

L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, Petitioner,

vs.

James V. Reuter, Inc.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[April 10, 1944.]

Mr. Chief Justice Stone delivered the opinion of the Court.

Petitioner brought this suit pursuant to § 17 of the Fair Labor Standards Act of June 25, 1938, 52 Stat. 1060, 29 U. S. C. §§ 201 *et seq.*, to restrain respondent, a Louisiana corporation, from violating the Act. The District Court found violations of §§ 6, 7, 15(a) (1) (2) and (5) of the Act and gave judgment permanently restraining respondent, "its agents, servants, employees and attorneys, and all persons acting or claiming to act in its behalf or interest" from further violations. On appeal the Circuit Court of Appeals for the Fifth Circuit reversed, 137 F. 2d. 315, and remanded the cause to the District Court for further proceedings. This Court granted certiorari, 320 U. S. 731.

The present proceeding is a motion to recall the writ of certiorari, submitted by the attorney who has appeared for respondent in this Court and in the two courts below. His motion is based upon the affidavit of James V. Reuter, described as the former president of the respondent corporation, from which it appears that on December 15, 1943, shortly after this Court had granted certiorari, Reuter and two others, being all the stockholders of respondent, duly signed a consent that the corporation be dissolved and that Reuter be designated its liquidator; and that one day later, on December 16, 1943, Reuter, as liquidator, certified that the corporation had been "completely wound up and is dissolved". Upon filing the consent and certificate with the Secretary of State, with proof of publication of the notice of dissolution, the Secretary

of State issued his certificate of December 31, 1943, certifying that the corporation "stands dissolved". See § 54 of Act 250 of the Louisiana Legislature of 1928 as amended by § 1 of Act 65 of 1932, and §§ 62 and 64 of Act 250 of the Louisiana Legislature of 1928. The purpose of the dissolution is stated to have been to secure tax advantages.

In support of the motion it is argued that since the corporation is, by Louisiana law, now dissolved without any prolongation of its life for the purpose of continuing pending litigation against it, see *McCoy* v. *State Line Oil & Gas Co.*, 180 La. 579, 583, the case has become moot; and further that, for want of a party respondent, this Court is without power to render any effective judgment in the appellate proceeding now pending before it.[1]

In the present posture of the case we think it plain that the moving papers fail to establish that the case is moot or has abated merely because of the dissolution of the corporate defendant. See *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290, 307-310; cf. *Southern Pacific Co.* v. *Interstate Commerce Comm'n*, 219 U. S. 433, 452; *Southern Pacific Terminal Co.* v. *Interstate Commerce Comm'n*, 219 U. S. 498, 514-516; *Leonard & Leonard* v. *Earle*, 279 U. S. 392, 398. The judgment rendered by the District Court determined, subject only to resort to the prescribed appellate review of the judgment, the right of the administrator to an injunction restraining the corporation and those associated or identified with it from violating the statute. Not only is such an injunction enforceable by contempt proceedings against the corporation, its agents and officers and those individuals associated with it in the conduct of its business, *Wilson* v. *United States*, 221 U. S. 361, 376-377; cf. *In re Lennon*, 166 U. S. 548, but it may also, in appropriate circumstances, be enforced against those

[1] In the *McCoy* case, it was held at 585-586 that it is the duty of a liquidator of a corporation in dissolution to "terminate in a legal manner . . . by prosecuting, defending, or compromising it, all litigation pending in which the corporation is a party". The court further stated that "the Legislature had no intention of sanctioning the issuance of a certificate of dissolution" where the liquidator had failed to discharge that duty, to the injury of opposing litigants. The Louisiana court deemed it appropriate in that case to annul the certificate of dissolution of the corporation there involved, in view of its liquidator's failure to terminate in a legal manner, prior to dissolution, the suit there under consideration.

We do not consider whether in this case this Court has a like power to annul the certificate of dissolution of respondent corporation, so as to permit the continuation of appellate proceedings here, for, as will appear, other disposition of the case seems more appropriate.

to whom the business may have been transferred, whether as a means of evading the judgment or for other reasons. The vitality of the judgment in such a case survives the dissolution of the corporate defendant. *Southport Petroleum Co.* v. *Labor Board*, 315 U. S. 100, 106-107. And see, to like effect, *Labor Board* v. *Hopwood Retinning Co.*, 104 F. 2d 302, 304-305; *Interstate Commerce Comm'n* v. *Western New York & P. R. Co.*, 82 Fed. 192, 194-195; *Morton* v. *Superior Court*, 65 Cal. 496; *Katenkamp* v. *Superior Court*, 16 Cal. 2d 696; *Mayor* v. *New York & S. I. Ferry Co.*, 64 N. Y. 622; *Farmers Fertilizer Co.* v. *Ruh*, 7 Ohio App. 430; *Sperry & Hutchinson Co.* v. *McKelvey Hughes Co.*, 64 Pa. Super. 57, 61-62; cf. *Alemite Mfg. Corp* v. *Staff*, 42 F. 2d 832, 833; *Labor Board* v. *Colten*, 105 F. 2d 179, 183; *Union Drawn Steel Co.* v. *Labor Board*, 109 F. 2d 587, 589, 594-595. And these principles may be applied in fuller measure in furtherance of the public interest, which here the petitioner represents, than if only private interests were involved. See *Virginian Ry. Co.* v. *System Federation*, 300 U. S. 515, 552, and cases cited.

Whether a family business, such as this one appears to be, has successfully avoided all responsibility for compliance with the judgment entered against the family corporation, by the simple expedient of dissolving it and continuing the business under the individual control of members of the family, as appears to have taken place here, is a question which it is unnecessary for us to decide on the basis of the scanty and not entirely enlightening affidavits now submitted to us. It is enough for present purposes, if the appellate procedure, rendered abortive by respondent's dissolution, has not deprived petitioner of the benefits of the judgment rendered in his favor by the District Court, that he is entitled to initiate proceedings to enforce the judgment against individuals who either disobey its command or participate in the evasion of its terms. In such proceedings the question as to how far the successor to the corporation is bound by the decree may be fully investigated by the District Court, with appropriate appellate review. The decisive question for us then is whether petitioner can be rightly deprived of the benefit of the District Court's judgment by respondent's invocation of the appellate procedure provided by the statute, followed by the frustration of that procedure by respondent's dissolution.

It is true that this Court cannot, in the present state of the record,[2] render an effective judgment on the merits, because the sole respondent brought before us by the petition for certiorari, by reason of its dissolution, no longer has capacity to be sued, and no one has sought to procure substitution of any other person as party respondent. Such is the effect of dissolution under the Louisiana law. See *McCoy* v. *State Line Oil & Gas Co., supra*; *Ortego* v. *Nehi Bottling Works,* 182 So. 365, 367 (La. App.); compare *Oklahoma Natural Gas Co.* v. *Oklahoma,* 273 U. S. 257. But the judgment of the District Court was entered against respondent before it was dissolved and while it was capable of being sued. Hence it was binding on respondent and, as we have seen, on others who, in appropriate circumstances, may be brought within its reach. The dissolution of respondent, so long as the certificate of dissolution is not annulled, precludes enforcement of the judgment against it, but does not foreclose petitioner from asserting his rights against such other persons as may be bound by the judgment. Hence it does not follow, because the pending appellate proceeding has abated, that the judgment of the District Court has abated because of respondent's dissolution. Nor does it follow, because of this Court's inability to proceed with the appeal on the merits for want of a proper party respondent, that petitioner is to be deprived of the benefit of his judgment in the District Court, which the statute contemplates shall be undisturbed save only by pursuit to completion of the prescribed appellate procedure.

It is a familiar practice of this Court that where for any reason the Court may not properly proceed with a case brought to it on appeal, or where for any reason it is without power to proceed with the appeal, it may nevertheless, in the exercise of its supervisory appellate power, make such disposition of the case as justice requires. When events subsequent to an appeal may affect the correctness of the judgment appealed from, this Court may vacate the judgment and remand the cause for further proceedings. *Missouri, ex rel. Wabash Ry. Co.* v. *Public Service Comm'n,* 273 U. S. 126, 131; *Patterson* v. *Alabama,* 294 U. S. 600, 607, and cases cited; *Villa* v. *Van Schaick,* 299 U. S. 152, 155-156. When it is without jurisdiction to decide an appeal which should have been prosecuted to another court, it may vacate the judgment

[2] Compare note 1, *supra.*

and remand the cause in order to enable the court below to enter a new judgment from which a proper appeal may be taken. *Gully* v. *Interstate Nat. Gas Co.*, 292 U. S. 16; *Oklahoma Gas Co.* v. *Oklahoma Packing Co.*, 292 U. S. 386, 392; *Jameson & Co.* v. *Morgenthau*, 307 U. S. 171, 174; *Phillips* v. *United States*, 312 U. S. 246, 254. If a judgment has become moot, this Court may not consider its merits, but may make such disposition of the whole case as justice may require. *United States* v. *Hamburg-American Co.*, 239 U. S. 466, 477-478; *Heitmuller* v. *Stokes*, 256 U. S. 359, 362-363; *Brownlow* v. *Schwartz*, 261 U. S. 216, 218.

Here, for the reasons we have stated, it appears that petitioner is entitled to retain the benefit of the judgment entered in his favor by the District Court, subject only to the review of that judgment on appeal as the statute prescribes, and that that judgment is not shown to be moot or to have abated. But review of a judgment of the District Court contemplates more than a consideration of the case by the Circuit Court of Appeals alone. The losing party in that court may secure further review here upon certiorari, if he so desires and if this Court, in its discretion, grants the writ. Thus appellate review of the judgment of the District Court had not been completed when respondent was dissolved, and the full review contemplated by the statute was frustrated by that dissolution. By reason of that action, the judgment of the Circuit Court of Appeals, which is not final because the case is pending in this Court, cannot rightly be made the implement for depriving petitioner of the benefit of his judgment in the District Court. We conclude, therefore, that in the circumstances the only just and appropriate disposition which can be made of this case is that the judgment of the Court of Appeals be vacated, and the judgment of the District Court restored, as though respondent had taken no appeal.

The judgment of the Court of Appeals is vacated, and the cause will be remanded to the District Court, where petitioner will be free to take such proceedings for the enforcement of the judgment of the District Court, as he may deem advisable, and as may be proper in the circumstances of the case. Any order of the District Court will, of course, be subject to appropriate appellate review.

So ordered.